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IN THE

Supreme Court of the United States

October Term 1981

ANTHONY I. GIACOBBE,

Appellant,

—against—

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Appellees.

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

Whether that part of Section 22(b) of the New York City Charter which provides for the election of ten members of the forty-five member New York City Council on an at large basis, and allocates two of the at large seats to each of the City's five boroughs, violates the "one person, one vote" principle of the Fourteenth Amendment.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and amici curiae participated in the proceedings before the Court of Appeals:

(i) Plaintiffs-Appellees:

Carl Andrews; Pedro S. Cordero; Benjamin Tenzer

(ii) Defendants-Appellants:

Edward I. Koch, both individually and as Mayor of the City of New York; The City of New York; Thomas J. Cuite, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges and Elections of the Council of the City of New York; Melvin

Markus, both individually and as Chairman of the Redistricting Commission appointed by the Council of the City of New York; and the Board of Elections of the City of New York (hereinafter, "City defendants").

(iii) Intervenor-Defendant-Appellant:

Anthony I. Giacobbe

(iv) Amici Curiae:

New York Civil Liberties Union; New York State Black and Puerto Rican Legislative Caucus; Puerto Rican Legal Defense and Education Fund, Inc.

Albert Boyle, William Miller, and Henry Stern intervened as defendants only in the District Court proceedings. To the best of appellant's knowledge and belief, said parties have no further interest in the outcome of this appeal.

The City defendants have informed the District Court, and have announced that they do not intend to appeal the decision of the Court of Appeals. To the best of appellant's knowledge, said parties have no further interest in the outcome of this appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

No. _____

ANTHONY I. GIACOBBE,

Appellant,

-against-

CARL ANDREWS, PEDRO S. CORDERO AND BENJAMIN TENZER,

Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit,

dated March 16, 1982, is unreported and is reprinted in the Appendix to this Jurisdictional Statement at A.1.

The unreported Memorandum of Decision and Order of the United States District Court for the Eastern District of New York is reprinted in the Appendix at A.3. The District Court also issued a "Memorandum Accompanying Judgment," dated December 1, 1981, again unreported, and which is reprinted in the Appendix at A.31.

JURISDICTION

This is an action for declaratory and injunctive relief to declare Section 22(b) of the New York City Charter invalid on the ground, among others, that said section violates the "one person, one vote" principle embodied in the

Fourteenth Amendment to the United States Constitution. Federal subject matter jurisdiction was invoked by plaintiffs below pursuant to 28 U.S.C. Section 1331, 1343, 2201 and 42 U.S.C. Section 1971(d).

The decision of the United States Court of Appeals for the Second Circuit was entered on March 16, 1982. That decision affirmed, without opinion, the District Court's decision granting partial summary judgment on behalf of plaintiffs declaring Charter Section 22(b) unconstitutional. A.1. The notice of appeal was filed in the United States Court of Appeals for the Second Circuit on June 11, 1982. A.35.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. Section 1254(2) because the decision appealed from invalidated a municipal legislative action to which the state has given the force of law, on the validity of which

appellant relies, on the ground that the statute is repugnant to the Constitution of the United States. City of Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1490 (1980); City of New Orleans, et al. v. Dukes, d/b/a Louisiana Concessions, 427 U.S. 297, 301 (1976); Doran v. Salem Inn., Inc., 422 U.S. 922, 927, n. 2 (1975).

In deference to the policy behind Section 1254(2), this Court accords special respect to those cases in which a federal court of appeals has declared the statute of a sovereign state unconstitutional, thus raising sensitive issues of federal-state relations. An appeal from a decision of a federal court of appeals coming within Section 1254(2) may not be dismissed for failure to present "a substantial federal question," Sup. Ct. Rule 16.1 (b). When a federal court of appeals has declared a state statute unconstitutional, a substantial Federal

question is presented ipso facto.

Appellant Anthony I. Giacobbe, an incumbent at large Council Member from the County of Richmond, Borough of Staten Island,* was granted leave to intervene as a party to the proceedings below as a matter of right, by order of the United States Court of Appeals for the Second Circuit entered February 25, 1982. A.41-43. Council Member Giacobbe did in fact file briefs and participated fully as a party in the proceeding below. Accordingly, appellant is entitled to prosecute this appeal as of right.** California Retail Dealer's Association v. Midcal Aluminum, Inc. 445 U.S. 97 (1980).

*One of a 43 member Council, to be increased to 45 (33 District Members increased to 35) upon reapportionment, with Justice Department approval (June 1982).

**Council Member Giacobbe's interest in the outcome of this appeal is discussed further at pp.33-36 , infra.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. Const. Amend. XV

22. Composition of council.

a. The council shall consist of the president of the council and of other members termed council members.

b. One council member shall be elected from each council district as now or hereafter constituted, and two council members shall be elected at large from each of the boroughs.

c. No party or independent body as defined in the election law shall nominate more than one candidate for council member to be elected at large in any borough.

d. Each elector shall have the right to vote for not more than one candidate at large and the two candidates receiving the largest numbers of votes in each borough shall be elected.

New York City Charter,
Section 22

STATEMENT OF THE CASE

General Background

New York City is the country's largest city, with a population of approximately 7.1 million people. The polyglot ethnic, racial, national and cultural mix of New York City's population is unmatched by any other city in the world. In addition, as the host city to the United Nations, and as the nation's principal

center for international trade, finance and communications, New York occupies a unique position as the nation's "World City", the window through which the rest of the world sees and learns about the United States.*

In many respects New York City is actually a prototypical metropolitan regional government. Historically, the City is an amalgam of extremely diverse smaller governmental entities. Brooklyn was, until consolidation in 1898, one of the nation's largest cities in its own right. Queens and the Bronx were a collection of self-governing towns and villages.

Staten Island, which also became a part of the City in 1898, was and still remains a predominantly rural and rela-

* Report of the Twentieth Century Fund Task Force on the Future of New York, New York--World City; Oelgeschalager, Gunn & Hain (Cambridge, Massachusetts,) 1980.

tively undeveloped borough, whose one-and-two-family homes contrast sharply with Manhattan's skyscrapers. This amalgam of regional and urban qualities is reflected in many aspects of the City's government, including the at large feature of the City Council, which is the subject of this appeal.

Pursuant to Sections 21 and 27 of the New York City Charter, the City's legislative power is vested in an elected City Council. Charter Sections 22 and 23 provide that the Council shall consist of (i) a President, elected on a City-wide basis; (ii) one Council member to be elected from each Council district (now numbering thirty-five), which districts are apportioned according to population and subject to reapportionment following each federal census; and (iii) two additional Council members to be elected at large from each of the City's five boroughs

irrespective of their populations.

The sole issue presented for review in this appeal is the constitutionality of Charter Section 22(b), providing for the borough-wide election of the ten at large Council members, out of a total body of forty-five members, which the Court of Appeals has declared to violate the "one person, one vote" principle embodied in the Fourteenth Amendment.

It is important to note at the outset that the forty-five member New York City Council is a unicameral, not a bicameral, legislature, whose at large members and district members enjoy the same powers and perform the same duties. In addition, the total constitutency represented by the at large members is the same as that represented by district members. While each at large member represents more constituents than does each district member, the principal distinction between

the council members at large and the district council members is in the manner in which they are elected.

The at large feature of the City Council is not a device created by the Council itself, or even by the state legislature, although that feature was subsequently adopted by the State, which adopted the City Charter. Rather, Charter Section 22(b) was ratified after extensive public discussion and debate by the overwhelming majority of the voters of each borough at a special City-wide referendum held in 1961. The public's purpose in adding the at large seats to the City Council and the State's purpose in ratifying same, was to break the longstanding Democratic Party lock on the Council by making possible the election of minor party candidates.

The historical circumstances that made this reform necessary, and the suc-

cess it has subsequently achieved in diversifying the political composition of the Council, as well as in facilitating regional decentralization of the City's government, are described below.*

The History and Purpose of the At Large System

From 1936 to 1947, the City Council was elected and operated under a system of proportional representation, whose purpose was to reflect the diverse political interests in the City. Although the proportional representation system succeeded in producing a politically diverse Council, it proved to be an ex-

* The history of the at large Council seats is summarized in two reported cases, Blaikie v. Wagner, 258, F. Supp. 364 (S.D.N.Y. 1965), and Blaikie v. Power, 13 N.Y.2d 134 (1963), appeal dismissed for lack of a substantial Federal question, 375 U.S. 434 (1964), and also in the affidavit of Edward N. Costikyan submitted in the District Court in opposition to plaintiffs' motion for partial summary judgment. A.44.

tremely cumbersome and unwieldy device. Each voter was asked to mark on a paper ballot his or her order of preference for 20 or 30 candidates, a task which needlessly and overly complicated the counting of ballots, and tended to discourage the public's participation in the voting process.

As a result of widespread public dissatisfaction, proportional representation was abolished by referendum in 1947, and the Council reverted, for practical purposes, to a Democratic Party monopoly that disenfranchised a significant portion of the City's electorate. The resulting degree of disparity between actual minority party strength in the City, as reflected in the percentage of votes obtained by minority party candidates in the mayoral elections, and the minority party representation on the City Council, is demonstrated in Exhibit A set forth at

A.67-68.

These lopsided results led again to general public dissatisfaction with the structure and composition of the City Council, and resulted in the convening of two Commissions.* One of their purposes was to devise a new structure for the Council which would foster minority party representation without the debilitating complications experienced under proportional representation.

After long and thoughtful study, both Commissions recommended to the voters that the City Charter be revised to provide for the addition of two at large Council members to be elected from each

* The New York State Commission on Governmental Operations of the City of New York, chaired by Hon. Frank C. Moore, and the Charter Revision Commission of the City of New York, chaired by Hon. John T. Cahill.

borough on a "limited voting" basis. The "limited voting" feature of the at large proposal, as ultimately embodied in Charter Sections 22(c) and (d), permits each political party to nominate only one candidate to run at large in each borough, and further limits each elector to cast only one vote for that office. Both the winner and runner-up candidate are elected, and they cannot be from the same political party. The anticipated result of the proposed Charter reform was the election of at least five at large Council members belonging to minority parties in each election.

The Commissions' proposal was put to the voters on November 7, 1961, and adopted by better than two-to-one margins in every borough, for a total vote of 634,152 "yes" to 294,338 "no".

THE AT LARGE SEATS WERE INTENDED TO COMPENSATE THE BOROUGHS FOR THEIR SURRENDER OF CONTROL OVER MUNICIPAL SERVICES TO THE CENTRAL CITY GOVERNMENT.

In 1962, concurrently with the creation of the at large seats, the City Charter was also revised to transfer direct control over the remaining municipal services--such as street repair and sewer maintenance--which were still being performed by the five individual boroughs, to the centralized city government. The creation of the at large seats was also intended to compensate the boroughs for their loss of direct control over these municipal services, as well as for the relinquishment of other borough control to the central city government. However, local control was not relinquished entirely; by providing an autonomous borough-wide oversight function in the central city government, the at large

council members from each borough have been able to safeguard their borough's interest in securing and maintaining its fair share of essential services. In addition, the recognition of the individual borough's entitlement to a legislative voice was the prelude to a later Charter revision in 1975, which vested additional oversight function in the individual boroughs while preserving centralized administration in the city government (see pp. 22-25, infra).

The autonomous voice provided by the additional at large seats is especially important in the case of Staten Island, given its relatively small and otherwise powerless political position vis-a-vis the large boroughs in the central city government. In this sense, the creation of the at large seats was intended to, and has, provided Staten Island the same kind of protection from majority tyranny,

in exchange for a surrender of sovereignty, provided to Rhode Island in the "Great Compromise" establishing the United States Senate.

THE AT LARGE SYSTEM HAS PROVIDED MEANINGFUL MINORITY REPRESENTATION IN THE NEW YORK CITY COUNCIL

Shortly after Charter Section 22(b) became effective on January 1, 1963, the at large provisions survived two challenges on state and federal constitutional grounds. First, in Blaikie v. Power, 13 N.Y.2d 134 (1963), appeal dismissed for want of a substantial federal question, 375 U.S. 439 (1964), the New York Court of Appeals held that the limited voting aspect of the at large system did not offend the state constitution.*

*The Court of Appeals also held that Section 22(b) did not violate the Fourteenth Amendment of the federal constitution, citing Gray v. Sanders, 372 U.S. 368 (1963). 13 N.Y.2d at 144. The summary dismissal of the appeal by this Court occurred during the same term that Reynolds v. Sims was decided, after the argument but before the opinion was published.

Subsequently, in 1965, following this Court's decision, the court sitting in the Southern District of New York rejected a federal constitutional challenge on the identical grounds of "one person, one vote" advanced by plaintiffs here. Blaikie v. Wagner, 258 F. Supp. 364 (S.D. N.Y. 1965) (hereinafter referred to as Blaikie). Noting that the at large provisions were "designed to afford at least the possibility of representation to a large segment of the population" who could not otherwise elect minority party representatives to the Council, Judge Moore, writing for a unanimous court, concluded that there was a "rational justification" for the "minimal" population disparity introduced by the election of the ten at large Council members. 258 F. Supp. at 369, 370.

Sanctioned by the two Blaikie decisions, the ten at large Council members

have been a part of the New York City Council for the last eighteen years. During the period, the at large system has accomplished precisely the function foreseen by the two Commissions who devised it and desired by the public who adopted it. In every Council election since Charter Section 22(b) was adopted, beginning with the special election in 1963, minority parties, including at various times Republican, Liberal and Conservative parties, have succeeded in capturing five of the ten at large seats.

The impact of the at large system on the political diversity of the Council is illustrated in the following table, which shows the political composition of the City Council since 1949:

Table I

Years	Total Number of Members	Democrats	Republicans	Liberals	Conservatives
1949	25	24	1		
1953	25	23	2		
1957	25	24	1		
1961	25	23	2		
1963	37	31	6		
1965	37*	30	6		
1969	37	30	3	4	
1973	43	37	5	1	
1974	43	37	5	1	
1977	43	37	4	1	1

*One seat vacant.

THE AT LARGE SYSTEM HAS FACILITATED THE DECENTRALIZATION AND REGIONALIZATION OF NEW YORK CITY GOVERNMENT

In addition to diversifying the political composition of the City Council, the at large system has come to serve another function of increasing importance in New York City government. The election of the ten at large members on a borough-wide basis, giving each borough two Council members who represent the interests of the entire borough as an autonomous entity, is consistent with the trend toward decentralization which began in 1975.

Prior to 1975, in the years following consolidation, more and more governmental services had been moved from the boroughs to the central City government. The trend, which paralleled the growing predominance of the federal government over state and local government, culminated in the 1962 revisions to the New York

City Charter which transferred almost all remaining governmental functions to City Hall. See pp. 11 - 12 , supra.

Experience with this overly centralized government for some ten years, in turn, led to a movement to restore some governmental voice to smaller and more responsive political subdivisions in the City. A half step in that direction was taken in a 1975 Charter revision, which marked a turning point in the flow of governmental powers from the boroughs to the central city. Under the 1975 Charter, the borough was recognized once again as an important semi-autonomous governmental unit with responsibilities in the planning and service delivery areas. Borough boards were created to pass upon land use matters and to deal with service delivery problems. Pursuant to Section 85 of the City Charter, the at large Council members are statutory

members of the borough boards. A. 74.

Despite the creation of the borough boards and the half step toward decentralization, control over delivery of services is still vested for the most part in a centralized government, making the borough-wide voice of the Council Member at large an important link in the chain of effective government.*

The 1975 Charter also created 59 community districts to which limited

*District Council Members representing particularized districts, do not represent the "universal" constituency of each borough. Moreover this court should be made aware that budget appropriations comprise one of the Council's principal functions. Thus while budget requests come in from each district, they are often competing and some are more appropriate and in the borough's best interest than others. Thus, it is the Council Member at Large who must evaluate relative merits of individual district requests. There are many other issues which impact upon a district in one way, but upon the borough in another. It is therefore the Council Member at Large who performs a valuable oversight function for the borough community as a whole.

governmental responsibility was transferred. The creation of these community districts has been viewed as a first step toward the creation of what is known throughout the world as two-level or two-tiered municipal government.*

* Two-level government as epitomized in cities such as London, Stockholm, Belgrade, Peking, Tokyo, and almost every other major world city, involves the allocation of certain local governmental functions, like garbage collection, street maintenance and local park management, to independent governments usually with populations of between 150,000 and 300,000. Other governmental functions, such as garbage disposal, fire and police are wholly under the control of a regional government -- comparable to the New York City government. The objective is to create regional government entities to deal with regional problems while leaving small governmental entities such as New York City's five boroughs intact to handle local problems. Many students of municipal government believe that two-level, or two-tiered, government is essential if metropolitan areas are to be able effectively to govern themselves. See, e.g. Professor Alan Campbell's "Reshaping Government in Metropolitan Areas," 1970, published by the Committee for Economic Development.

The council member at large concept, in short, is part of a still-evolving process of fashioning an effective and responsive government for the country's largest metropolis.

THE AT LARGE SYSTEM DOES NOT THREATEN THE PREDOMINANT POLITICAL POWER OF THE MORE POPULOUS BOROUGHS

The appellees' challenge to the constitutionality of Charter Section 22(b) is simplistic and doctrinaire. Appellees do not concern themselves with either the long history of trial and error and public debate that led to the creation of the at large seats, or with the 18 years of politically responsive City Council government (which affords both local and minority party representation) that has followed the adoption of the at large system. They have, in fact, avoided these issues, especially the constitutional issue of the importance of

minority party representatives in a democratic society. Nor do appellees claim that the present at large system has permitted any political, racial or geographic minority to dominate the Council, or that it has inflicted any other genuine injury on the body politic. Instead, focusing primarily upon the two at large Council seats allocated to Staten Island, appellees contend simply that the at large system discriminates against them by giving Staten Island residents a slight over-representation on the City Council as compared to the residents of the other boroughs.

Staten Island is the smallest of New York's five boroughs, with a population (according to the 1980 census) of approximately 352,000 as compared with Brooklyn's population of about 2,230,000. In the proposed forty-five member Council, including the ten at large members, Staten Islanders would have 3.8 Council

Members,* when strict population equality would entitle them to only 2.2 Council members. Staten Island's additional 1.6 out of 45 members is the basis for the Court of Appeals' judgment that New York City's unique minority representation system, fashioned for a demographically and politically unique population, is unconstitutional.

Initially, it must be noted that the additional 1.6 representation of Staten Island translates into .035 of the Council's total membership. Certainly, such a "disparity" should be considered de minimis.

Furthermore, as a matter of fact,

* The fractional .8 share of a Council member results from the fact that Staten Island and Brooklyn share one of the thirty-five apportioned councilmanic districts. The shared district member has been apportioned on the ratio of the two boroughs' respective contribution of population to the shared district.

Staten Island's extra 1.6 out of 45 Council members affords its residents no such disproportionate legislative power. One common indicia of legislative power is the control over key legislative offices and committee chairmanships. Exhibit C, set forth at A.72-73, shows the borough residence of the Council members occupying each of the key City Council offices and the standing committee chairmanships, since 1966. Exhibit C demonstrates that at no time since the enactment of Charter Section 22 has Staten Island controlled any of the key offices, or occupied more than an insubstantial number of committee chairmanships. The balance of power has remained primarily in Brooklyn (with 13.2 representatives), although Queens, commensurate with its growing population, has assumed progressively greater power on the Council.

Moreover, it remains practically impossible today for any combination of Council Members representing boroughs with less than 50% of the City's total population to outvote the members representing the more populous boroughs. In the worst possible case, assuming that the three less populous boroughs, Bronx, Manhattan and Staten Island, attempted to overpower Brooklyn and Queens, which together have 59% of the City's population, they would still be outvoted by a vote of 22 to 23. A.54-56.

Appellees' Claim

Appellees' entire case rests upon a statistical analysis which shows that each of the 352,000 residents of Staten Island has a .001063% share of a Council member, while each resident of Brooklyn has only .00058570% of a Council member. The difference of .0000478% results in a variation from the City-wide mean of

41.03% for Staten Island's 352,000 people out of New York City's 7,007,000 residents. That is appellees' entire case. It is a case which rests on figures, and ignores facts posing problems of constitutional dimension.

PROCEEDINGS BELOW

On the basis of appellees' statistics, the District Court granted partial summary judgment to appellees on their first cause of action, and declared Charter Section 22(b) constitutionally invalid under the Equal Protection Clause of the Fourteenth Amendment. Despite the District Court's obvious skepticism*

* The District Court's sentiments are exemplified by the following remark made toward the end of oral argument (A.76.): "What practical difference would that make in the government of the affairs of the city through the Council? What would really be accomplished by that other than the possible destruction of the Liberal Party, the Republican Party, or members of whatever? It is getting down to that, since they are a minority party that they should really be outvoted." (emphasis supplied).

concerning the practical political implications of appellees' claim, as reflected in many of the Court's remarks during the argument, the District Court's Memorandum of Decision and Order made it plain that the Court felt itself constrained by this Court's development of the "one person, one vote" principle in the years since Blaikie to reject the rationale of the Blaikie Court and to strike down the at large system.

The Court of Appeals affirmed the District Court's judgment without opinion on March 16, 1982, the day after argument. It is interesting to note that that affirmation is unreported and uncitable, the Court of Appeals having designated its decision as having no precedential value, thereby obviously limiting its future applicability.

APPELLANT'S INTEREST IN THIS APPEAL

Appellant was granted leave to intervene as of right by the Court of Appeals on February 25, 1982. A.41-43. In his affidavit in support of his motion to intervene, Council Member Giacobbe set forth his interest in the outcome of this proceeding, both as a representative of Staten Island, the only borough whose political position in the city government will be substantially affected by the outcome, and as an incumbent at large member whose seat may be abolished or politically emasculated as a result of the decisions below. A.77.

To those reasons there must now be added a third, even more compelling, reason for Council Member Giacobbe to pursue this appeal. Given the decision of the City defendants themselves to abandon this appeal, Council Member Giacobbe is the only remaining party who

represents the will of the people of the City of New York, expressed directly in the most democratic possible manner in their overwhelming adoption of the at large seats by public referendum in 1961. See p. 11, supra.

In addition, Council Member Giacobbe remains the sole proponent of the ideal of minority party representation, for if he should not prevail on the merits of this appeal, New York City will almost certainly return to a one-party monopoly of its government.

Notwithstanding the self-appointed role of appellees as the so-called guardians of the public interest, this Court should not lose sight of the fact that it is the people of the City of New York who created the at large positions and who have elected the present at large Council members to their seats. It is appellees who seek to disturb the status

quo and to abrogate the spoken voice of the people.

Moreover, this court's attention is directed to the fact that out of seven federal judges who have considered the constitutionality of the New York City Council at large seats, three have ruled in favor of their constitutionality (Blaikie, 258 F.Supp., supra), and four have ruled against (Andrews, supra). In the time which has elapsed between Blaikie and Andrews, the population of Staten Island has increased dramatically, while the populations of the remaining four boroughs have decreased. If, in 1965, before the population increased on Staten Island, Blaikie held that there was a "rational justification" for the "minimal population disparity" introduced by the election of the ten at large Council Members, the theory of that case is even more applicable now.

Moreover, the fact that three federal judges have ruled in favor of the constitutionality of the at large seats, and four have ruled against, furnishes a perilously slim margin, in a democratic government, by which to invalidate a popularly-adopted legislative system which has successfully governed the nation's largest and most diversified city for eighteen years. In order that this vital public question receive review by the highest Court in this nation, Council Member Giacobbe has decided to pursue this appeal.

THIS APPEAL RAISES A SUBSTANTIAL QUESTION

THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has held that the "one person, one vote" principle applies to local as well as state legislative bodies. Avery v. Midland County, 390 U.S. 474

(1968). On the other hand, the Court has also recognized that "one person, one vote" must be applied in a far more liberal and flexible manner in "resolving the complex problems of the modern megalopolis in relation to the city, the surburbia and the rural country side." Dusch v. Davis, 387 U.S. 112, 117 (1967); see also, Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 110-111 (1967), in which the Court recognized that "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions."

The problem, however, of negotiating a constitutional course between the Scylla of malapportionment and the Charybdis of single-party, over-centralized urban government has been left in the hands of local governments themselves, on a case-

by-case basis, with little guidance from this Court. The fact that the Court of Appeals' decision in this case is directly in conflict with the prior decision of both the three-judge District Court in Blaikie, as well as the decision of the New York Court of Appeals in Blaikie v. Power, 13 N.Y.2d 134 (1963), appeal dismissed for lack of a substantial federal question, 375 U.S. 439 (1964) (see pp. 44-47 infra), is evidence of the difficulties which the lower courts have experienced in attempting to reconcile the competing claims of individual rights presented by such cases. A decision by this Court is necessary to settle that conflict.

This case, therefore, presents a substantial question which renders it appropriate for plenary review by this Court.

THE COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE "ONE PERSON, ONE VOTE" PRINCIPLE MUST BE APPLIED WOODENLY AND RITUALISTICALLY OR IN LIGHT OF COMMON SENSE

The Court of Appeals' decision squarely presents the question of whether the "one person, one vote" principle must be applied woodenly as a "simon-pure doctrine of equality in voting" (to use the District Court's own words A.86-88), where it makes no sense, and where, in fact, it damages the entire fabric of a democratic society based upon a two party system and minority representation. This question is more compelling here since, unlike Reynolds v. Sims and its companion cases, the alleged violation of the principle has not been imposed by an entrenched and dominant faction of the local legislature, representing a minority of the population, which has the power to sustain itself in office. Staten Island does not control the City Council, and there is no

possibility that Staten Island, either singly or together with the smaller boroughs, can overpower and outvote the larger boroughs. (See pp. 26ff, supra.)

The issue here is not the vindication of one protected civil right. This case presents a conflict of competing individual and political rights, each of which has a legitimate and constitutional claim to be weighed in the balance. First, there is the fundamental individual right, recognized in Reynolds v. Sims, of each citizen to have his or her vote counted equally with every other citizen's vote. 377 U. S. 533 at 555, 568. Competing with that right is the equally fundamental right of the members of New York City's minority parties to have some degree of political representation on the City Council; see, e.g.,, Hechinger v. Martin, 411 F. Supp. 650 (D.D.C. 1976), aff'd, 429 U.S.

1030 (1976).* Finally there is also the important interest recognized by this Court in Dusch v. Davis of attempting to "reflect a detente between urban and rural communities," such as Brooklyn on the one hand and Staten Island on the other, when such diverse communities are consolidated into a single regional metropolitan government. 387 U.S. at 117.

*The danger of possible "oppression" by the majority party in local legislative bodies has been recognized since the founding of the Republic and in fact was one of the principal arguments asserted in favor of replacing the Articles of Confederation with the Constitution. As Madison wrote in his famous 10th Federalist Paper:

> "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression."

To our knowledge, in the eighteen years since Reynolds v. Sims was decided, not once has this Court been called upon to apply the "one person, one vote" doctrine where there existed such a bona fide conflict of rights, at least not in the context of a large metropolitan government of such diversified population as New York City. Given the urgent need to resolve New York City's legislative crisis, as well as the nationwide concern with similar reapportionment issues in light of the 1980 census, an immediate settlement of this question by this Court would be timely and in the public interest.

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE TWO BLAIKIE DECISIONS.

The District Court's decision in this case, affirmed by the Court of Appeals, presents a sharp conflict in both its

method of analysis, as well as its outcome, as compared to the decision of the three-judge District Court in Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965). Blaikie is a model of the practical and flexible approach that, we believe, ought to be applied in apportionment cases involving complex metropolitan governments like New York. The decision below eschews such an approach, in favor of a rigid adherence to certain "percentages of deviation" applied by this Court in completely different circumstances. Moreover, the decision below ignores the unique composition of the unicameral New York City Council, which is composed of thirty-three district members concededly apportioned in accordance with the "one person,one vote principle" and ten at large members, representing the same constituents as the district members, but who represent borough-wide interests and

whose election safeguards the concept of the two-party system, and minority party representation.

The Blaikie Decision

Judge Moore's opinion in Blaikie begins by reviewing the history of New York City's efforts to provide minority party representation on the City Council, referring to most of the facts which are summarized at pp. 7-9 supra, of this Jurisdictional Statement. Judge Moore then considers in turn each of the reasons advanced by the City in support of the at large system, especially the need for political diversity and regional autonomy, which are also discussed at pp. 22-26 supra. In many respects, the three-judge District Court's decision in Blaikie borrows from, and builds upon, the earlier decision of the New York Court of Appeals in Blaikie v. Power, 13 N.Y. 2d, supra, in which the Court of Appeals had also

upheld the constitutionality of the existing at large system against both state and federal constitutional challenges. Both of the Blaikie courts differed sharply from the decision rendered in this case below in their thoughtful consideration of the unique problems of New York City government. And both Blaikie courts agreed that, in the light of those problems, the at large system is a rational political solution.

Judge Moore next turned to a balanced and realistic consideration of whether the at large system threatened any meaningful dilution in the political power of the residents of the larger borough. As Judge Moore squarely acknowledged (258 F. Supp. at 367, 368):

> The first focal point for judicial scrutiny is whether the councilmen representing Canarsie [Brooklyn] and Tottenville [Staten Island] can by teaming up together impose the will of a small number of voters upon a much larger group

> who by reason of inadequate representation are unable to resist.

The three-judge court correctly observed that no such result could be obtained at that time from the "minimal" disparity in weight of representation introduced into the City Council by the addition of the ten at large Council members (Id. at 369, 370):

> The disparity in voting strength in the City Council between the boroughs due to the method of election of the councilmen-at-large is not substantial but minimal. The people of New York are fairly represented in their legislative body. There is no present ability on the part of the three (out of thirty-seven) Staten Island Councilmen to enact city legislation detrimental to the mass of voters of Manhattan, Bronx, Brooklyn, and Queens.

In the sixteen years since Blaikie was decided, the degree of disparity has diminished substantially, not grown. The total size of the Council has been expanded to 45 members, of which Staten Island

elects only 3.8. At the same time, the population of Staten Island has increased relative to the other boroughs, further reducing the disparity in representation.* Thus, the at large system today poses even less of a threat of minority oppression than it did in 1965.

The District Court's Decision Below

The decision of the District Court, unlike the two Blaikie decisions, makes no serious effort to come to grips with the City's unique problems of minor party

* The Blaikie decision contains the following population figures for the City's boroughs in 1964 (258 F. Supp. at 368:

Bronx	1,424,551
Manhattan	1,698,281
Queens	1,809,578
Brooklyn	2,627,313
Staten Island	221,991

The above figures show that the spread between Brooklyn and Staten Island has narrowed by about 450,000 people, as compared to the 1980 census figures.

representation and regional government*. Instead, the District Court simply held, after a cursory review of the arguments advanced on behalf of the City, that whatever the political and governmental merits of the at large system, the "departure from population equality" introduced into the Council by Staten Island's "extra" at large seats is "simply too extreme to withstand scrutiny under the 14th. Amendment." A.22. The Court so

*The decision below makes an attempt to distinguish Blaikie by asserting that the Blaikie court had "no reason to anticipate (this) Court's. . . extension of the Reynolds rule to purely local elections." A.19. This assertion is fallacious. The three-judge court both anticipated this Court's ultimate ruling on this point in Avery v. Midland County, supra, and in any case considered itself bound by the prior three-judge district court decision in Bianchi v. Griffing, 238F. Supp.997 (E.D.N.Y. 1965), appeal dismissed 382 U.S. 15 (1965), which held that the "one person, one vote" principle applies to local legislative apportionment.

found despite the fact that the "extra" seat comprises a mere .035 of the Council.

In reaching its judgment, the District Court appears to have been particularly influenced by this Court's decision in Abate v. Mundt, 403 U.S. 182 (1971). A. 13-18. Thus, the only analysis of the novel issues presented by this case was by a single federal court in a case which, other than the fact that it dealt with local government apportionment, has no relevance to this case.

This case involves the application of the "one person, one vote" rule to a unicameral legislature consisting of both district members and at large members, whereas Abate considered the constitutionality of a unicameral legislature containing only district representatives.

In following Abate, the District Court applied a formula for determining total percentage deviation. However,

that formula is inapplicable and produces a misleading statistic. The Abate court devised a formula for determining deviation by dividing the number of district representatives into the total population of Rockland County to establish a base figure to reflect the number of constituents each legislator should represent. However, in Rockland County, each legislator represented a separate and distinct constituency. In the case at bar, by contrast, the forty five members of the Council do not represent separate and distinct constituents, but rather, the Council Members at large represent the same constituents as do the thirty-three district members who are apportioned in accordance with the "one person, one vote" rule. Consequently, the application of Abate has resulted in a grossly inflated total percentage deviation statistic for the New York City Council.

It would be equally erroneous to apply the Abate formula separately to the thirty-three district members and the ten at large members. To so separate the district members from the at large members in establishing a total percentage deviation would be to treat the Council as if it were a bicameral legislature, which it is not. Thus, the Abate formula is totally inapplicable in this case.

At the time that Abate was decided, Rockland County consisted of five surburban towns with a total population of about 200,000 people. Although the five towns differed in population, they were otherwise essentially homogeneous in character The County's interest in preserving the integrity of its subdivisions was more in the nature of a historical and traditional attachment than a practical necessity. It is thus untenable to suggest that Rockland County is in any way analogous

to New York City.*

More importantly, this Court was not confronted in Abate with the necessity of preserving minority party representation in the legislative body. In the only apportionment case in which this court has squarely confronted this problem, the Court approved Washington, D.C.'s city-wide election of five at large Council members despite the fact that the District's limited voting procedure absolutely deprived members of the majority Democratic Party of the right to nominate candidates for several at large seats. Hechinger v. Martin, 411 F Supp. 650

*A more closely analogous case is Dusch v. Davis, 387 U.S. 112 (1967), which involved the City of Virginia Beach, which had been consolidated with the surrounding county to form seven boroughs of widely disparate character and population. In Dusch this Court approved an ordinance which required seven of the eleven members of the City Council to live in different boroughs, although all were elected at large by the entire City.

(D.D.C.1976), aff'd, 429 U.S. 1030 (1977). The District Court's reasoning in Hechinger, which this Court affirmed without opinion, is equally applicable here (411 F. Supp. at 652):

> We think that the Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol is a valid one, sufficiently important to warrant the challenged interference with the rights of political association, and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgement of those rights.

Perhaps the most serious flaw in the District Court's decision is its inadequate consideration of the problems involved in devising a genuinely practical alternative to the present at large system. The present system, which has worked so well for eighteen years, is not the slipshod creation of some hasty legislative committee. It is the product of a long evolutionary process, marked by trial and

error, innovative and scholarly study, and open public debate. Such a well-considered and successful government institution should not be lightly discarded in blind obedience to an abstract doctrine of purely mathematical voting equality.

The District Court, on several occasions, suggests that one alternative solution would be to allocate the at large seats on a population basis. A. 23-25. The problems with the proposal are readily apparent. If Staten Island is used as the base, and assigned one at large seat, then Brooklyn would have, as a minimum, approximately nine at large seats, and so forth. The result would be a tremendous increase in the size of the Council that would be prohibitively expensive, politically undesirable and publicly unacceptable. If, at the other extreme, Staten Island were given a fractional share of one at large member, or

a single member with a fractional vote, the goal of an autonomous borough voice for Staten Island on the Council would be irretrievably lost.

Other purported alternatives have been glibly tossed about by the appellees, various amici curiae, and the press. We are aware of none that both addresses the problems and passes constitutional muster. Proportional representation has been tried and failed. A City-wide at large system, given the present demographics of New York City, would raise problems under the Voting Rights Act and Fifteenth Amendment, and would require an enormously expensive City-wide campaign that few, if any, candidates would be willing to undertake for such an office. It would also sacrifice the goal of regional autonomy. A wholesale abandonment of the at large concept, as advocated by appellees, would sacrifice both of the goals at present served by

the at large system.

It is always possible that there may be an equal or even better solution that no one has thought of. But that is not the issue. The question is not whether the existing at large system is the best conceivable solution to the problems of regionalism and minority representation in New York City government, but whether it is a constitutionally acceptable solution. Only this Court can finally answer that question.

CONCLUSION

The issue raised in this appeal was succinctly stated by the District Court at the close of oral argument, where the Court remarked (A.90):

> THE COURT: Well, all I can say is it does seem to me that there are limits even upon orthodoxy, and that the essential criteria are reason and common sense, and hopefully, even the Supreme Court may accept that as a principle of decision to be interpreted under the Constitution. (Emphasis added).

Appellant concurs with the sentiments of the District Court as expressed above. We believe that the prior "one person, one vote" decisions of this Court leave room for application of "reason and common sense" in applying that doctrine to the unique circumstances of New York City. If, on the other hand, the lower courts are correct that this Court's decisions since Blaikie require a rigidly orthodox application of the "one person, one vote" principle, then, we respectfully submit, it is time for this Court to re-examine that position in light of the unique circumstances presented here.

For each of the reasons stated above, this Court should note probable jurisdiction, or in the alternative grant a writ

of certiorari, to review the decision of the court below.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

Seal of: United States Court of Appeals
March 16, 1982
A.Daniel Fusaro, Clerk
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Sixteenth day of March one thousand nine hundred and eighty-two.

Present: HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

CARL ANDREWS, PEDRO S.CORDERO and BENJAMIN TENZER

Plaintiffs-Appellants, 82-7007

v.

EDWARD I. KOCH, both individually and as Mayor of the City of New York, et al., 82-7059

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Neaher below.

/s/ Wm. H. Timbers
William H. Timbers, U.S.C.J.

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ Lawrence W. Pierce
Lawrence W. Pierce, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - x

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,	:	
Plaintiffs,	:	81 Civ. 2542 (ERN)
-against-	:	
EDWARD I. KOCH, both individually and as Mayor of the City of New York, THE CITY OF NEW YORK, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS J. CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, MELVIN MARKUS, both individually and as Chairman of the Redistricting Committee appointed by the Council of the City of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,	:	MEMORANDUM OF DECISION AND ORDER
Defendants.	:	

- - - - - - - - - - - - - - - x

APPEARANCES:

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NEAHER, District Judge.

Plaintiffs in this action seek partial summary judgment on their first cause of action,[1] which claims that New York City's electoral plan for electing ten of the 45 members[2] of the City Council on an at-large basis violates their constitutional rights under the "one person, one vote" principle derived from the Fourteenth Amendment's equal protection clause. Since there appears to be no genuine dispute among the parties as to the relevant and material facts pertinent to that claim, summary judgment is an appropriate procedure for

determining whether the facts entitle plaintiffs "to judgment as a matter of law." Fed.R.Civ.P. 56(c). See SEC v. Research Automation Corporation, 585 F.2d 31, 35 (2d Cir. 1978).

Plaintiffs, who include one black citizen and one of Puerto Rican or Hispanic heritage, are registered voters residing in different election districts within the Borough of Brooklyn and County of Kings in the City of New York. They claim the dilution of their voting rights by reason of defendants' actions. The individual defendants named hold the positions of mayor, president of the City Council, majority leader and vice-chairman of the Council's committee on rules, privileges and elections, chairman of the Redistricting Commission appointed by the Council, and members of the City's Board of Elections.[3]

They are sued as the officials individually and collectively responsible for the enforcement of the City Council electoral plan of which plaintiffs complain. Defending the existing plan, defendants have cross-moved for summary judgment dismissing plaintiffs' claim for lack of merit.

Pursuant to the Charter of the City of New York, §§21, 27, the City's legislative power is vested in the City Council. Sections 22 and 23 of the Charter, as amended, provide that the Council shall consist of a President, elected on a City-wide basis, Council members elected from Council districts, now numbering 35, which are subject to redistricting after each federal census to assure precise equality of population, and two Council members-at-large from each of the City's five boroughs. All are

elected for four year terms. Plaintiffs' constitutional challenge on this motion is premised solely on the current differences in population of the boroughs the five pairs of at-large members represent, attributable in part to substantial racial minority increases in some of the boroughs.

Before considering the respective parties' contentions, a brief history of the challenged electoral plan is in order. First, it should be noted, these defendants did not originate the plan; they simply carry it out as required by law. The plan was originally adopted by the voters of the City as part of the new New York City Charter at the general election held November 7, 1961, by a vote of 634,152 to 294,338. The plan went into effect as part of the Charter on January 1, 1963, and thus has governed the manner of electing at-large Council members for

some 18 years. In 1965 the plan was challenged on the same constitutional grounds advanced by plaintiffs here and survived that challenge. A three-judge district court sitting in the Southern District of New York found that "(t)he disparity in voting strength in the City Council between the boroughs due to the method of election of the Councilmen-at-large is not substantial but minimal." Blaikie v. Wagner, 258 F. Supp. 364, 369 (S.D.N.Y. 1965). Noting that the at-large method was "designed to afford at least the possibility of representation to a large segment of the population" who could not otherwise elect minority representatives to the Council, the court concluded that there was no violation of the Fourteenth Amendment under the principle of "rational justification referred to by the Supreme Court in Baker v. Carr, 369 U.S. 186, 235 (1961). Blaikie, supra, at 370.

Defendants strongly urge this Court to adhere to the Blaikie ruling as dispositive here.

That there are wide differences in borough population is evident from the following tabulation, the accuracy of which is not disputed:

Borough[4]	Population
Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	352,121

Focusing primarily on Brooklyn's population of over six times that of Staten Island, plaintiffs contend that the present at-large councilmanic plan denies voters in the larger boroughs, such as Brooklyn, the full representational weight of their vote, since they elect only the same number of at-large City legislators as lesser populated boroughs. Plaintiffs complain that such inequality

results in a debasement or dilution of their voting rights, operates as effectively as would a total denial of the right of suffrage, and has been repeatedly held to violate the equal protection clause of the Fourteenth Amendment in a long line of Supreme Court decisions following the leading case of Reynolds v. Sims, 377 U.S. 533 (1964).

While recognizing the substantial disparities in borough populations, defendants contend that statistical variations alone cannot displace legitimate political goals which non-proportional voting systems may constitutionally seek to advance. They maintain that before an apportionment system may be struck down for violating the statistical guidelines of Reynolds and its progeny, a reviewing court must consider whether the statistical deviations are caused by concern for

legitimate political goals and whether the resulting legislative body adequately reflects the political interests of the populace. Here, defendants urge, the Council members-at-large device was not the creation of a legislature intent on preserving the power of a minority to control the legislative machinery, but a conscious "one person, one vote" decision by the voters themselves. They point out that two distinct political interests were advanced by the borough-wide election of two Council members per borough. One goal was to ensure minority representation in a local government dominated by a single political party, and the other to do so through political units, the boroughs, having a strong traditional base in New York City government, so as to assure adequate representation of borough-wide interests in replacement for the diminished powers of the Board of Estimate.[5]

Emphasizing that the ten at-large seats constitute less than 25% of the Council, defendants argue that one and a half more Council members allotted to Staten Island is not so significant as to require further redistricting.

As plaintiffs and amici cogently point out, however, the difficulty with defendants' position is that the Supreme Court has consistently adhered to quite different standards in assessing the conformity of electoral plans to constitutional requirements. First, the Court has instructed "that electoral apportionment must be based on the general principle of population equality and that this principle applies to . . . local elections, Avery v. Midland County, 390 U.S. 474, 481 (1968)." Abate v. Mundt, 403 U.S. 182, 185 (1971). Second, even though "viable local governments may need

considerable flexibility in municipal arrangements if they are to meet changing societal needs . . . this (Supreme) Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation." Abate, supra, at 185. To the contrary, the Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors . . . ." Id. at 185-86.

Abate, supra, is particularly apposite here as illustrating the Court's consistent adherence to its standard method of determining whether population deviations in election districts are within permissible limits. In that case

Rockland County, New York, had devised a plan for an 18-member county legislature to be chosen from five districts which corresponded exactly to the county's five constituent towns. These towns varied widely in population and the number of legislative representatives was determined by assigning one representative to the smallest town and dividing its population into that of each of the other town to ascertain how many additional representatives each larger town should be granted. The plan was challenged as unconstitutional but upheld by the New York Court of Appeals. In affirming that court's decision, the Supreme Court noted that population variations among the districts produced "a total deviation from population equality of 11.9%," id. at 184; but the Court was "not prepared to hold that the . . . plan violates the Constitution" in view of Rockland County's

long governmental tradition and "the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas." Id. at 187. Of significance here is the Court's concluding remark that:

> "(N)othing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality." 403 U.S. at 187.

In Abate, supra, each district's legislative representation was in fact roughly proportionate to its population. See 403 U.S. at 184, n.1. Here, even on the most conservative basis as shown in the following table, the total deviation from population equality is 50.4% for a City Council of 45 seats:

	Population	Number of Council-members	Population Per Council-member	% Deviation from the Norm
Brooklyn	2,230,936	13.20[6]	169,010.3	-7.56%
Queens	1,891,325	11	171,938.64	-9.42%
Manhattan	1,427,533	8.92	160,037.33	-1.85%
Bronx	1,169,115	8.08	144,692.45	+7.92%
Staten Island	352,121	3.80	92,663.42	+41.03%

The total deviation percentage of 50.4% is derived by computing the percent of deviation from the norm of the most underrepresented district with that of the most over-represented district, here the Boroughs of Queens (-9.4%) and Staten Island (+41.0%).[7] This is the formula devised by the Supreme Court to measure the extent to which population disparities among legislative districts either conform or fail to conform to the constitutional requirement of substantial population equality. See Abate, supra, 403 U.S. at 184, in which an 11.9% total deviation from population equality was held not violative of the Constitution, and Whitcomb v. Chavis, 403 U.S. 124, 161 (1971), holding that a total variance of 28.2% between overrepresented and underrepresented districts was constitutionally unacceptable.

In the face of such an extreme deviation between overrepresented and underrepresented boroughs - more than four times the 11.9% guardedly sanctioned in Abate, supra - this Court cannot uphold the present method of electing at-large members to the City Council on the reasoning of the Blaikie case, as defendants suggest. Although the Supreme Court's decision in Reynolds v. Sims, supra, preceded the 1965 ruling in Blaikie, there was then no reason to anticipate the Court's later extension of the Reynolds rule to purely local elections. We now know from Reynolds and the many cases following it that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, supra, 377 U.S. at 555. And this is likely to result when

"population is submerged as the controlling factor in the apportionment of seats in the particular legislative body . . ." Id. at 581.

The apportionment cases which followed Reynolds have consistently confined permissible deviations from equal population to relatively narrow limits, even in those in which some relaxation was permitted. See, e.g., Mahan v. Howell, 410 U.S. 315 (1973), where Mr. Justice Rehnquist observed that "a State's policy urged in justification of disparity of district population, however, rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." Id. at 326. More recently, Mr. Justice Stewart reaffirmed the principle that "a voter's right to 'have an equally effective voice' in the election of representatives is impaired

where representation is not apportioned substantially on a population basis." City of Mobile, Alabama v. Bolden, 446 U.S. 55, 78 (1980).

On the undisputed facts it is obvious that a voter in the Bronx or Staten Island gets substantially more representation for his or her ballot than a voter in Brooklyn or Queens. The effect is to deprive voters in the latter boroughs of an equal opportunity to participate in the political process. The right to vote is a fundamental right, and it is basic to the value of that right that it be equal among all citizens. The ten at-large Council seats comprise more than 20% of the voting strength of that legislative body, a substantial proportion by any measure. That the plan to treat all boroughs equally in filling those seats was originally adopted by the

City's voters, as stressed in the Blaikie decision, is immaterial. The Supreme Court has made it clear "that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause . . . ." Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 737 (1964).

The departure from population equality in allocating at-large seats in the City Council is simply too extreme to be justified on the grounds advanced by defendants. Even while recognizing that "slightly greater percentage deviations may be tolerable for local government apportionment schemes," the Supreme Court has pointed out that it has never suggested "that certain geographic

areas or political interests are entitled to disproportionate representation." Abate, supra, 403 U.S. at 185. Here, the interests defendants urge in support of the status quo appear to be essentially political.

First, the claim that there must be equal at-large representation on the Council "to preserve a 'detente' among the incredibly varied constituent boroughs of the City"[8] is hardly a convincing reason. Granted that the residents of each borough would wish to have their local concerns properly recognized by the City Council, the allocation of at-large seats on a population basis would seem a more effective means of achieving it. And, as already noted, additional channels of communication exist between the boroughs and City Hall through the Borough Presidents, who sit on the Board of Estimate,

and the Borough Boards consisting of both at-large and district Council members as well as representatives of local Community Boards.

The other reason defendants and intervenors press upon the Court is clearly political, namely, possible impairment of the role of minor political parties in presenting different or dissenting views in the deliberations of the City Council, which would otherwise be dominated by the majority Democratic Party. Undoubtedly, such representation as minor political parties now have in the Council is attributable to what may be termed the "one candidate, one vote" requirement embodied in the at-large electoral plan, which assures the election of runner-up minor party candidates on an at-large basis. Again, the Court discerns no reason why the allocation of at-

large seats on a population basis would destroy minor political parties or prevent the election of their candidates in boroughs other than possibly Staten Island.

Finally, defendants suggest that the present system provides an opportunity for the election of candidates from racial and ethnic minority groups. Indeed, this suggestion is supported by the intervenors, two of whom are black Liberal Party candidates. Though not germane to plaintiffs' claim on this motion, amici representing black and Hispanic voters who support plaintiffs' position take a different view. They point out that during the entire history of the at-large system, only one ethnic minority Council member at-large has ever been elected and there are none in that group now. They maintain, moreover, that

they are not interested in minority political parties with whom they do not identify, but rather seek recognition and voting rights consistent with their population increase in the several boroughs.

The issue to be decided on plaintiffs' present motion, however, does not implicate questions of political, racial or ethnic discrimination. Simply stated, the question is whether the allocation of an equal number of at-large Council seats to each of the five boroughs, without regard to substantial population disparities, comports with the constitutional rule of substantial numerical equality derived from the Equal Protection Clause of the Fourteenth Amendment. On the undisputed facts, that question must be answered in the negative and the present apportionment of at-large

seats in the New York City Council held to be unconstitutional.

Accordingly, there being no just reason for delay, Rule 54(b), plaintiffs are entitled to entry of a separate judgment on their first cause of action declaring that the present equal apportionment of at-large seats in the New York City Council violates the "one person, one vote" principle embodied in the Equal Protection Clause of the Fourteenth Amendment and must be replaced by an electoral plan which accords due recognition to the population differences among the boroughs.

The Court is aware, however, that defendants are currently devising a new apportionment plan for the election of district Council members, so as to meet the objections of the Attorney

General under the Voting Rights Act, 42 U.S.C. §1973(c) (1976). No directions will be made at this time to implement the Court's judgment, in the expectation that any revised electoral plan for the City Council will comply with the Constitution as well as the Voting Rights Act.

SO ORDERED.

The Clerk of the Court is directed to enter judgment accordingly and to furnish copies of this Memorandum of Decision and Order to counsel for the parties.

s/Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
November 17, 1981

FOOTNOTES

1
Only partial summary judgment is sought because plaintiffs' other causes of action complain of other matters such as, for example, inequities in the delineation of councilmanic election districts, which clearly present issues of fact and are subject to prior scrutiny by the Attorney General of the United States. See Herron v. Koch, 81 Civ. 1956 (E.D.N.Y. 1981 (three-judge court)), cert. denied, U.S. Sup. Ct., Dkt. No. A-218 (Sept. 9, 1981).

2
Under New York City Local Law 47, recently signed by the Mayor, the number of seats on the City Council has been increased from 43 to 45, 35 elected from districts and 10 elected at large from the five boroughs of the City.

3
In addition to defendants, three Liberal Party candidates for the office of councilman at-large, Albert Boyce, William Miller and Henry Stern, were permitted to intervene.

4
These boroughs are respectively coterminous with the Counties of Kings, Queens, New York, Bronx and Richmond.

5
While it may be true that more power resides in City Hall, judicial notice may be taken that each Borough President still has a vote on the Board of Estimate, the Mayor, Comptroller and City Council President having two votes

each. Official Directory, The City of New York, 1981-82, p. 18.

6 These figures include at-large and district seats. Fractional figures for "Number of Councilmembers" are necessary because the Bronx and Manhattan share two Councilmembers and Brooklyn and Richmond share one. The fractions are computed by the proportion of population as reported in the 1980 census in the portion of the divided district that is within the borough to which the fraction is assigned.

7 The present Council of 43 seats is subject to an even greater deviation from equality, namely, 55.6%.

Plaintiffs take the position that these percentages measure only the "minimum deviation" from population equality. In their view the ten at-large seats represent multi-member districts (the five boroughs) distinct from the Council election districts in which the other Council candidates compete for election. Thus, they argue, the percentage deviation from population equality for the at-large seats is actually 132.8%. The Court rejects that argument and percentage, since it is obvious that all Council members, however elected, sit as one body and represent the entire City. The Council cannot be treated as a bicameral legislature as plaintiffs suggest.

8 Memorandum of Law of Defendants New York City Council and Thomas J. Cuite at 41.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Plaintiffs,

-against-

EDWARD I. KOCH, both individually and as Mayor of the City of New York, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS J. CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, MELVIN MARKUS, both individually and as Chairman of the Re-districting Committee appointed by the Council of the City of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Defendants,

and

ALBERT BOYLE, WILLIAM MILLER and HENRY STERN,

Intervenor-Defendants

81 CV 2542 (ERN)

MEMORANDUM ACCOMPANYING JUDGMENT

Although all parties agree upon the need for prompt appellate review, there is a difference of opinion as to whether the Court's memorandum of decision and order dated November 17, 1981 sufficiently supports entry of a final, appealable declaratory judgment that the New York City Charter §22 violates the one person, one vote principle of the Fourteenth Amendment. This memorandum is intended to explain more fully the Court's reasons for its prior determination under Rule 54(b) that there is no just reason for delay in entering a final declaratory judgment on the first cause of action adjudicated, and its view that if the judgment is deemed not appealable under 28 U.S.C. §1291, there are good and sufficient reasons for review under §1292(b).

The cause of action now adjudica-

ted stands apart from other claims which are involved primarily with the Voting Rights Act of 1965 and are the subject of a three-judge court injunction granted in Herron, et al. v. Koch, 81 CV 1956 (E.D. N.Y. 1981), cert. denied, U.S. Sup. Ct., Dkt. No. A-218 (Sept. 9, 1981). That injunction stayed the primary election of district and at-large candidates for the City Council until the City proposed a Council redistricting plan which would be acceptable to the Attorney General under the Voting Rights Act. That plan did not affect at-large candidates, however. Since the Attorney General rejected the original proposed plan, a new plan was being devised but has not yet been submitted.

This Court's present decision casts a cloud on the constitutionality of more than 20% of the City Council seats. Obviously, it is of the utmost

importance to the City authorities---and, of course, to the public---to have the legal status of the entire Council resolved as soon as possible. Should this Court's decision be upheld, it will be necessary to revise the structure of the City Council and this will require State legislation and approval by the Attorney General under the Voting Rights Act. To avoid further postponement of elections, which should have taken place last November, it is essential that there be an early resolution of the issue of law decided on the summary judgment motion.

/s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
December 1, 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Plaintiffs-Appellees,

-against-

Civil Action No. 82-7007 82-7059

EDWARD I. KOCH, both individually and as Mayor of the City of New York, THE CITY OF NEW YORK, THOMAS J. CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, MELVIN MARKUS, both individually and as Chairman of the redistricting Committee appointed by the Council of the City of New York, and the BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Defendants-Appellants,

-and-

CAROL BELLAMY, both individually and as President of the Council of the City of New York,

Defendant,

-and-

ALBERT BOYCE, WILLIAM MILLER, HENRY STERN AND ANTHONY I. GIACOBBE,

Intervenors-Defendants.

----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ANTHONY I. GIACOBBE, Intervenor-Defendant above named, hereby appeals to the Supreme Court of the United States from a Judgment from the Second Circuit Court of Appeals, entered in this action on March 16, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

MARJORIE WEINBERG ROONEY and
RONALD J. MAZZUCCO
Attorneys for Intervenor-Defendant
ANTHONY I. GIACOBBE
675 Forest Avenue
Staten Island, New York 10310

Tel.: (212) 273-1400

Dated: Staten Island, New York
June 9, 1982

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF RICHMOND)

JOAN BARNES, being duly sworn, deposes and says: deponent is not a party to the within action, is over 18 years of age and resides at Staten Island, New York. That on the June 9. 1982, deponent served the within Notice of Appeal to the Supreme Court on the attorneys whose names and addresses are listed below, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

1. Kim Hoyt Sperduto, Esq.
   LeBoeuf, Lamb, Leiby & MacRae
   Attorneys at Law
   140 Broadway
   New York, N.Y. 10005
   Attorney for Plaintiffs

   Certified Mail
   Return Receipt Requested:
   No. P35 8758199

2. Hon. Frederick A.O.Schwarz,Jr.
   Corporation Counsel for the City of New York
   100 Church Street
   New York, N.Y. 10007

3. Edward N. Costikyan, Esq.
   Paul, Weiss, Rifkind, Wharton & Garrison
   345 Park Avenue
   New York, N.Y. 10154

4. Herzfeld & Rubin, P.C.
   40 Wall Street
   New York, N.Y. 10005

5. Richard Emery, Esq.
   Arthur Eisenberg, Esq.
   c/o New York Civil Liberties Union
   84 Fifth Avenue - Room 300
   New York, N.Y. 10011

6. Paul Wooten, Esq.
   c/o New York State Black and Puerto Rican Legislative Caucus
   1360 Fulton Street, Suite 509
   Brooklyn, N.Y. 11216

7. Puerto Rican Legal Defense & Education Fund
   95 Madison Avenue - Suite 1304
   New York, N.Y. 10016

Att: Cesar Perales, Esq.
President and General Counsel

8. Jonathan Sinnreich, Esq.
Stuart, Zabin & Sinnreich
555 Fifth Avenue - Suite 1503
New York, N.Y. 10017

/s/ JOAN BARNES
JOAN BARNES

Sworn to before me on the
9th day of June, 1982.

/s/ LOUISE ROCCO
Notary Public

LOUISE ROCCO
Notary Public State of New York
No. 43-4651388
Qualified in Richmond County
Term Expires March 30, 1983

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL ANDREWS, et al.,

Plaintiffs-Appellees,

-against-

EDWARD I. KOCH, et al.,

Defendants-Appellants

Docket Number
82-7007
82-7059

Seal of the United States Court of Appeals Second Circuit, Filed Feb. 24, 1982, A. Daniel Fusaro, Clerk

NOTICE OF MOTION
FOR LEAVE TO INTERVENE

MOTION BY: Marjorie Weinberg Rooney
273-1400
Ronald J. Mazzucco
273-1400

OPPOSING COUNSEL: Kim Sperduto
269-1100

Has a request of opposing counsel for consent been refused? NO

Has service been effected? YES

Is oral argument desired? NO
This is a procedural motion.

Requested return date: Immediate consideration is necessary.

Date of argument of appeal, if scheduled: April, 1982.

Judge or agency whose order is being appealed: JUDGE EDWARD R. NEAHER (E.D., N.Y.)

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL: not applicable

Has request for relief been made below?

Would expedited appeal eliminate need for this motion?

If no, explain why not: The unique interests of the proposed intervenor are not adequately represented by the existing parties.

Brief statement of the relief requested:

Intervention pursuant to FRCP 24(a)(2) and 24(b)(2).

Previous requests for similar relief and disposition:

Order to show cause filed in Eastern District, N.Y. on December 29, 1981. Hon. Edward R. Neaher reserved decision; this court assumed jurisdiction on January 27, 1982 before any decision issued from the District Court.

Statement of the issue(s) presented by this motion?

Should Council Member Anthony I. Giacobbe, (R-C, S.I.) be permitted to intervene pursuant to FRCP 24(a)(2) and 24(b)(2).

Brief statement of the facts (with page references to the moving papers):

Council Member Anthony I. Giacobbe moves to intervene in the appeal of the judgment of the Eastern District, New York (Hon. Edward R. Neaher), declaring the councilman-at-large seats unconstitutional as violative of the one person one vote rule.

Summary of the argument (with page references to the moving papers):

Council Member Anthony I. Giacobbe clearly satisfies the requirements of intervenor as a matter of right; the motion to intervene below was unopposed; no prejudice will result to any of the parties from the granting of this motion. (Affidavit, pp.1-4).

2/22/82
Date

s/Marjorie Weinberg Rooney
Attorney for Anthony I. Giacobbe

----------ORDER----------

IT IS HEREBY ORDERED that the motion for leave to intervene

be and it hereby is granted,

s/Thomas J. Meskill

Seal of United States Court of Appeals Second Circuit, filed Feb. 25, 1982, A. Daniel Fusaro, Clerk

2/25/82
Date

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER, Plaintiffs,	81-Civ-2542 (E.R.N.)
-v-	
EDWARD I. KOCH, both individually and as Mayor of The City of New York, et al., Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

EDWARD N. COSTIKYAN, being duly sworn, deposes and says:

1. I am a member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for the defendants New York City Council and Thomas J. Cuite (collectively, the "City Council"). I make this affidavit in opposition to the plaintiffs' motion for partial summary judgment and in support of the City

Council's cross-motion for partial summary judgment dismissing plaintiffs' first claim.

2. The facts set forth in this affidavit are based on some thirty years of experience in the politics and government of this city. I have been at one time or another a Democratic district leader, a Democratic leader of New York County, a writer on New York City governmental problems, briefly a participant on the staff of the 1961 Charter Revision Commission, the chairman of the Task Force on the Structure of New York City Government for the Scott Commission, and the vice chairman of the Charter Revision Commission responsible for the 1975 Charter. The statistical information included in this affidavit is derived from certified voting rolls and other public documents.

THE CREATION OF COUNCIL MEMBERS-AT-LARGE

3. Council members-at-large were created by the 1962 Charter by direct vote of the people of New York City. The provision creating these Council Members was in a separate question which was voted on separately. It was adopted by a vote of 634,152 to 294,338. A majority of the voters in every borough voted for this provision, as follows:

	YES	NO
Manhattan	126,317	46,271
Bronx	113,759	52,038
Kings	174,286	85,415
Queens	198,096	97,530
Staten Island	21,694	13,084

4. Accordingly, the voters of Bronx, Queens and Brooklyn, by better than two-to-one margins, and Manhattan by 2 1/2 to one, voluntarily decided to give Richmond the same two council

members-at-large that the other boroughs received. The council members-at-large device is therefore not something that was foisted on the voters by a legislature intent on creating or preserving the power of a minority to control the legislative machinery. It was a conscious, "one person, one vote" decision to provide for minority representation in the council on a borough basis.

THE NEED FOR MINORITY REPRESENTATION

5. The background of the creation of council members-at-large is summarized in two reported cases, Blaikie v. Powers, 13 NY 2d 154 (1963) and Blaikie v. Wagner, 258 F.Supp. 364 (S.D.N.Y. 1965). In brief, the facts are as follows.

6. From 1938 to 1947, New York City operated under a system of proportional representation, whose purpose was to create a council which reflected the diverse political interests in the city.

7. Proportional representation did result in a council with great diversity. It included in its numbers Democrats, Republicans, American Labor Party members, and members of the Communist Party. The method of electing under proportional representation, however, was extremely complicated and gave rise to general dissatisfaction. Each voter was asked to mark on a paper ballot his or her order of preference for 20 or 30 candidates. The task proved impossible as a practical matter, and the counting of ballots took an interminable period of time. In addition, the election of a member of the Communist Party was made into a minor cause-celebre by some.

8. Proportional representation was abolished by referendum in the mid-1940's, and the council reverted, for practical purposes, to a one party status.

It was overwhelmingly Democratic with 1 or 2 Republicans, at the most, at a given time. There was, indeed, a time when the Republican minority leader had only himself to lead.

9. The 1961 Charter revisers were concerned about minority representation. They thought in terms of political minorities, although the device they created is equally useful to ethnic minorities. The device was to create 2 council members-at-large from each borough, but to provide that each voter could vote for only one candidate. It was thought that this would result in the election of at least 5 members of the Republican Party, which was the principal opposition party.

10. In fact, the Republican Party's candidates did not always win the second seat and other parties, including the Liberal Party and the Con-

servative Party, from time to time have been successful in electing council members-at-large.

11. One of the considerations which went into the creation of the council members-at-large device was the disparity between the percentage of the vote obtained by minority mayoral candidates and the percentage of the seats they were able to win in the council. Annexed hereto as Exhibit A is a chart setting forth those disparities. It reveals, for example, that in 1949 the successful Democratic candidate received 47.8% of the vote while minority candidates together garnered 50%. Nevertheless the council was 96% Democratic and 4% Republican. Similarly, in 1961 the successful Democratic candidate garnered 39.3% of the vote and the minority candidates, together, won 59.1%. In that

year 92% of the council was Democratic and 8% Republican.

12. Following the adoption of the Charter amendment which provided for council members-at-large, there was a doubling of the minority participation in the city council. In 1965 the successful mayoral candidate received 43.3% of the vote and other candidates the balance. The council instead of being 96% Democratic was 83% Democratic and 17% Republican. Most recently, in 1977, the Democratic candidate received 44.3% of the vote and the other candidates likewise received 48.3%. The council was 86% Democratic, 9%Republican, 2% Liberal, and 2% Conservative.

13. The minority council members have performed the function that the Charter contemplated they would perform. An analysis of votes cast on Council resolutions from 1974 to 1977 reveals that

the 33 District Council Members dissented or abstained on 4.77% of the votes, the council members-at-large dissented almost twice as often - 8.79%, and the five minority members-at-large dissented or abstained on 11.72% of the votes.

14. The council members-at-large device also affords opportunities to ethnic minorities to secure council representation. While this motion deals with the "one person - one vote doctrine", the motion nevertheless is made in a context involving minority voting rights, and the issue should not be disposed of without some consideration of the significance of the council member-at-large device in terms of minority representation on the council, which is substantial.

15. Because a candidate must only run second in order to win, it is relatively easy for a small population group

to elect a candidate. Annexed as Exhibit B is a table showing the number of votes needed to elect the second at large council member from each borough in 1977. In that year the second council member in the Bronx was elected by 24,936 votes, or 10.9% of those cast. In Staten Island the second council member was elected by 13,589 votes out of 69,233 cast, or a percentage of 19.6%. In Queens the second councilman was elected by 54,370 out of 456,897 cast, or 11.9%. In New York County the second councilman was elected by 52,774 out of 308,264 cast, or 17.1%. And in Brooklyn the second council member was elected by only 39,244 votes out of 423,686 cast, or 9.3%. In this context it is obvious that ethnic and language minorities, should they desire to run a candidate, ought to have relatively little difficulty in

electing one of their members.

15. While this does not directly bear on the one person, one vote argument it is, I believe, a factor to be weighed.

THE COUNCIL MEMBER-AT-LARGE MECHANISM DOES NOT PERMIT A MINORITY OF VOTERS TO ELECT A MAJORITY OF THE COUNCIL

16. One of the premises underlying the one person, one vote rule was the perception that, in many jurisdictions, legislators who redistricted themselves allocated disproportionate voting power to rural and sparsely populated areas. As a result, in case after case, it was demonstrable that 40% of the population, for example, could elect a majority of the legislative body. Having done so, at the next redistricting the same minority-electing majority could perpetuate its control of a majority of the legislative seats.

17. Because of New York's unique mixture of council districts and council members-at-large, it is statistically almost impossible to hypothesize that a minority of the population could elect a majority of the council. For example, Queens and Brooklyn between them represent almost 59% of the population of the city. Under the proposed redistricting Queens and Brooklyn between them have 20 1/3 district seats and 4 council members-at-large seats. The total is 24-1/3 seats out of 45. Because 2/3 of the 35th District is in Staten Island, we assume the 2/3 could out-vote the 1/3 in Brooklyn, and we disregard the 1/3 in Brooklyn. That gives Brooklyn and Queens 24 seats.

18. The other 3 boroughs -- Bronx, Manhattan and Staten Island, which represent approximately 41% of the popula-

tion--have between them 14 2/3 district seats and 6 council members-at-large seats, for a total of 20 2/3 (which we treat as 21). Therefore, if Manhattan, Bronx, and Staten Island attempt to gang up on the majority of the population of this city, they would not have the votes to do so.

19. This is not to say that one cannot conjure up some permutation under which 1 or 2 district seats in Queens or Brooklyn would vote with a Manhattan-Bronx-Staten Island bloc in an anti-Queens and Brooklyn cabal, thereby creating a majority of legislative seats with a minority of voters. Such theoretical computations, however, are not politically realistic and are unworthy of serious judicial attention. Indeed, if things ever get to that point, the underlying fabric of the city's govern-

ment will have been destroyed.

THE COUNCIL IS IN FACT NOT DOMINATED BY STATEN ISLAND

20. The underlying premise of the computations found in the plaintiffs' brief is that Staten Island voters have a disproportionately large share of influence in the City Council while Brooklyn voters are discriminated against.

21. The acid test, of course, is who dominates the council. The leadership of the council has never been dominated by Staten Island, and Staten Island is indeed rarely represented in the leadership.

22. The four major officers of the council are the majority leader, minority leader, finance chairman and general welfare chairman. Annexed as Exhibit C is a tabulation showing the boroughs of residence of Council officers

since 1962. Since that year, the majority leader has come from Queens (once), the Bronx (once), and from Brooklyn since 1970. The minority leader has come either from Manhattan (twice) or Brooklyn (3 times). The finance chairman has come from the Bronx (twice), from Brooklyn (once), and from Queens (twice). The general welfare chairman has come from Brooklyn (twice), Manhattan (once), and the Bronx (twice). Of other chairmanships, of which there have been 64 since 1962, a resident of Staten Island has held one of those chairmanships exactly 4 times in 20 years. Currently no member of the council from Staten Island is a committee chairman. Staten Islanders do not dominate the City Council.

INVALIDATION OF THE COUNCIL MEMBERS-AT-LARGE DEVICE WOULD BE AN OBSTACLE TO THE ACHIEVEMENT OF METROPOLITAN GOVERNMENT

23. There is an additional reason why borough representation on the City Council is appropriate and should be sustained.

24. Historically, of course, New York City is an amalgam of smaller governmental units. Brooklyn was, until consolidation, a separate city. Queens and the Bronx, until consolidation, consisted of a collection of self-governing towns and villages. Many of them still carry their former names, those names now being used to describe neighborhoods, such as Long Island City, Jamaica, Mott Haven, and Pelham.

25. Over the years since consolidation, more and more governmental functions have been moved from the boroughs, to the central City government. That trend toward centralization continued through the 1962 Charter revisions which moved almost all remaining govern-

mental functions to the central government.

26. Experience with this overly centralized government for some ten years, in turn, led to a movement to restore governmental functions to smaller political subdivisions of the city. A half step in that direction was taken in the 1975 Charter revision, which marked a turning point in the flow of governmental powers from the boroughs to the central city. Under the 1975 Charter, the borough was recognized once again as an important governmental unit with responsibilities in the planning and service delivery areas. Borough boards were created to pass upon land use matters and to deal with service delivery problems. Pursuant to Section 85 of the City Charter, the at-large council members, as well as the district council

members, are statutory members of the borough boards.

27. The 1975 Charter also created 59 community districts to which limited governmental responsibility was transferred. To many who participated in that Charter revision and supported it, the creation of community districts was viewed as a first step toward the creation of what is known throughout the world as two-level or two-tiered municipal government.

28. Two-level government as epitomized in cities such as London, Stockholm, Belgrade, Peking, Tokyo, and almost every other world city, involves the allocation of certain local governmental functions, like garbage collection, street maintenance and local park management, to independent governments usually with populations of between 150,000 and 300,000. Other governmental functions,

such as garbage disposal, fire and police are wholly under the control of a regional government -- comparable to the New York City government. The objective is to create regional governmental entities to deal with regional problems while leaving small governmental entities intact to handle local problems. Many students of municipal government believe that two-level, or two-tier, government is essential if metropolitan areas are to be able effectively to govern themselves. See, e.g. Professor Alan Campbell's "Reshaping Government in Metropolitan Areas", 1970, published by the Committee for Economic Development.

29. The movement towards creation of regional governments in this country has shown a tremendous impetus in the last twenty years. In 1970, there were 576 regional councils of one kind or another. The number is now greater.

The federal government has stimulated the proliferation of these regional entities. It has created what are known as SSMA's (Standard Statistical Metropolitan Areas), with wide powers for the receipt and distribution of federal grants in matters concerning their areas -- water supply, water pollution, air contamination, transportation planning and other functions.

30. The populations of units combining to form these regional entities inevitably vary, usually well beyond the accepted deviation from one person, one vote requirements. Nevertheless, almost uniformly, each participating unit has an equal vote in the regional council, whatever the population that unit represents. Without such equality it is difficult to get local governments of disproportionate size to participate.

31. I have not had adequate opportunity to ascertain to what extent these regional entities have legislative powers, although it is clear that many play a role in the allocation of federal funds, a legislative function, and, in the planning area, again a legislative function. Nor have I had an opportunity to determine the extent to which these regional entities are directly elected by the people from their subdivisions or are appointed by the government units which make up the regional entity. The wooden application of a mathematical one person, one vote rule, however, would forbid the direct election of members of regional entities from population units of varying size, although our history demonstrates that direct election is a preferrable and more democratic method. Indeed the indirect method of electing U.S. Senators was replaced by direct

election because of the abuses which a system of indirect election permits.

32. The significance of this problem is pointed up by the fact that New York City is in many ways a prototype of regional government. Especially in the 1975 Charter, there has been a developing effort to recognize both local, borough-wide and city-wide interests in a uniquely balanced governmental structure, which includes both the council members-at-large, the District Council Members, the Board of Estimate, and borough and community boards for boroughs and communities of disparate size. New York City is in the process of developing, by experimentation, a government which fits both regional and local needs.

33. The mindless application of a mathematical formula requiring equality of votes in such a complex governmental structure, without regard to the justifi-

cation for disparity, would be retrogressive. It surely would not serve the purpose which lies behind the one person, one vote doctrine, which was to improve representative government and to eliminate archaic forms which gave greater weight to geography than to people. The purpose was not to foreclose the rational development of fair and effective governmental techniques to deal with new and different governmental problems.

CONCLUSION

34. For the foregoing reasons, I respectfully pray that the motion for partial summary judgment be denied and that the cross motion for summary judgment be granted.

/s/ Edward N. Costikyan
Edward N. Costikyan

Sworn to before me this
9th day of October, 1981

/s/ Jonathan Sinnreich
Notary Public of N.Y. State

Suffolk County
No. 52-4704649
Commission Expires
3/30/83

EXHIBIT A

Comparison of Party Percentages in Mayoral and Councilmanic Elections

	1949		1953		1957	
Party	% Mayoral	% Council	% Mayoral	% Council	% Mayoral	% Council
Democrat	47.8	96%	45.6	92%	57.7	96%
Republican	21.5	4%	29.5	8%	26.3	4%
Liberal	14.1	0	19.1	0	9.8	0
Conservative	-	0	-	0	-	0
Other	14.1	0	4.2	0	4.1	0

EXHIBIT A (continued)

Comparison of Party Percentages in Mayoral and Councilmanic Elections

	1961		1965		
Party	% Mayoral	% Council	% Mayoral	% Council (w/o at large)	% Council (incl. at large)
Democrat	39.3	92%	37.7	96	83%
Republican	31.6	8%	32.7	4	17%
Liberal	8.6	0	10.6	0	0
Conservative	-	0	12.9	0	0
Other	18.9	0	3.0	0	0

EXHIBIT A (continued)

Comparison of Party Percentages in Mayoral and Councilmanic Elections

	1969			1973		
Party	Mayoral	% Council (w/o at large)	% Council (incl. at large)	Mayoral	% Council (w/o at large)	% Council (inc.l at large)
Democrat	31.5	93%	82%	5.0	97%	86%
Republican	13.4	4%	8%	14.5	3%	12%
Liberal	35.5	4%	11%	13.0	0	2%
Conservative	8.6	0	0	10.0	0	0
Other	8.2	0	0	7.7	0	0

EXHIBIT A (continued)

Comparison of Party Percentages in Mayoral and Councilmanic Elections

	1977		
Party	Mayoral	& Council (w/o at large)	& Council (incl. at large
Democrat	48.3	97%	86%
Republican	3.9	3%	9%
Liberal	35.2	0	2%
Conservative	3.9	0	2%
Other	5.3	0	0

EXHIBIT B

Number of Votes Required to Elect Second At Large Council Member From Each Borough

Borough	Total Votes Cast	Number of Votes To Elect Second At Large Member	Percent of Votes To Elect Second At Large Member
Bronx	228,456	24,936	10.9%
Manhattan	308,264	52,774	17.1%
Queens	456,897	54,370	11.9%
Brooklyn	423,686	39,244	9.3%
Staten Island	69,233	13,589	19.6%

EXHIBIT C

Borough Control of Key Council Positions

	Majority Leader	Minority Leader	Finance Committee	General Welfare Committee	Other Committees	
1966	Bronx	Brooklyn	Brooklyn	Brooklyn	Bronx	1
					Manh.	3
					Queens	1
					Brook.	4
					S.I.	1
1970	Brooklyn	Manhattan	Bronx	Manhattan	Bronx	1
					Manh.	2
					Queens	5
					Brook.	3
					S.I.	1
1974	Brooklyn	Brooklyn	Queens	Bronx	Bronx	2
					Manh.	4
					Queens	4
					Brook.	4
					S.I.	1

EXHIBIT C (Continued)

Borough Control of Key Council Positions

	Majority Leader	Minority Leader	Finance Committee	General Welfare Committee	Other Committees	
1979	Brooklyn	Brooklyn	Queens	Bronx	Bronx	3
					Manh.	2
					Queens	3
					Brook.	5
					S.I.	0

§85. Borough board. a. There shall be in each borough a board to be known as the borough board which shall consist of the borough president, the district council members and council members at large from such borough, and the chairperson of each community board in the borough. The borough president shall be the chairperson of such board, which shall hold public hearings at stated intervals in the borough and report to the board of estimate, the council, the mayor and the city planning commission on borough programs and proposed borough capital projects. A member from a community board shall vote only on issues that directly affect the community district represented by such member. The borough board shall employ technical and clerical assistance within appropriations for such purposes, and the borough president shall provide necessary additional staff assistance.

b. Each borough board shall:

(1) Cooperate with community boards and city agencies with respect to matters relating to the welfare of the borough and its residents;

(2) In its discretion hold or conduct public or private hearings;

(3) Meet at least once a month but no formal action of the board shall be taken except at a meeting open to the public;

(4) Assist agencies that deliver services within the borough in the preparation of service statements for the borough and review such statements;

(5) Prepare comprehensive and special purpose plans for the physical growth, improvement and development of the borough;

(6) Review and make recommendat-

ions with respect to applications and proposals of public agencies and private entities for the use, development, or improvement of land located in more than one district;

(7) Mediate disputes and conflicts among two or more community districts in the borough;

(8) Submit a comprehensive statement of the expense and capital budget priorities and needs of the borough;

(9) Evaluate the progress of capital developments within the borough and the quality and quantity of services provided by agencies within the borough; and (10) Otherwise consider the needs of the borough.

c. A majority of the members of any borough board entitled to vote on a matter before such board shall constitute a quorum of such board for action on such board.

d. Whenever any act is authorized to be done or any determination or decision made by any borough board, the act, determination or decision of the majority of the members present entitled to vote during the presence of a quorum, shall be held to be the act, determination or decision of such board.

e. Any borough board may adopt rules permitting a member to designate a representative to exercise all the power of such member as a member of the board for the purpose of determining a quorum of the borough board. (Amended by vote of the electors, Nov. 4, 1975; Local Law 1977, No. 102; Local Law 1981, No. 32)

THE COURT: No, I am simply saying that Staten Island's two -- two of Staten Island's councilmen -- I am assuming that you are entitled to a minimum of one -- whatever it is -- three is it or something like that?

MR. SPERDUTO: I think it's three now --

THE COURT: Well, we will leave them with one. What practical difference would that make in the government of the affairs of the city through the Council? What would really be accomplished by that other than the possible destruction of the Liberal Party, the Republican Party, or members of whatever? It is getting down to that, that since they are a minority party that they should really be outvoted.

MR. SPERDUTO: No, sir. I am not making that argument. I never have.

UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT
----------x

CARL ANDREWS, PEDRO S. CORDERO
and BENJAMIN TENZER,

Plaintiffs,

-against-

EDWARD I. KOCH, both individually and as Mayor of the City of New York, CAROL BELLAMY, both individually and as President of the Council of the City of New York, THOMAS J. CUITE, both individually and as Majority Leader and Vice Chairman of the Committee on Rules, Privileges, and Elections of the Council of the City of New York, MELVIN MARKUS, both individually and as Chairman of the Re-districting Committee appointed by the Council of the City of New York, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

AFFIDAVIT

No. 82-7007
82-7059

Defendants,

and

ALBERT BOYLE, WILLIAM MILLER
and HENRY STERN,

Intervenor-Defendants.

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF RICHMOND)

ANTHONY I. GIACOBBE, petitioner for intervention in the above entitled action, being first duly sworn, deposes and says:

1. This action involves the constitutionality of the elected public office which I hold as Council Member at Large in the New York City Council representing the Borough of Staten Island.

2. I have moved to intervene and become a party herein for the purpose and with all the rights provided by the Federal Rules of Civil Procedure 24(a)(2) and 24(b)(2) on the ground that the constitutionality of Section 22 of the New York City Charter affecting the public interest is drawn in question.

3. I was elected to my present public office on September 8, 1977 as the candidate nominated unanimously by

the Republican and Conservative parties in the Borough of Staten Island.

4. I assumed my office on January 1, 1978, and have served as Council Member at Large for the entire Borough of Staten Island to the present time.

5. I have received the unanimous nominations of the Republican and Conservative parties on Staten Island for re-election to the same public office in the citywide elections previously scheduled to be held on November 3, 1981, and my name would have appeared on the ballot as the official candidate of those political parties had the elections not been cancelled.

6. Had the elections been permitted to proceed as originally scheduled, my re-election to an additional four (4) year term of office commencing on January 1, 1982 was a virtual certainty.

7. The requirements for intervention as a matter of right in this action are clearly satisfied by my circumstances, as is more fully set forth in the memorandum of law filed in the District Court and appended hereto as Exhibit F.

8. This motion for intervention is timely made in that it was made with dispatch in the Eastern District of New York after the judgment entered by the District Court on December 1, 1981. (A copy of the Judgment is appended hereto as Exhibit A). The Order to Show Cause, supporting affidavit, memorandum of law, and other supporting papers were filed on December 29, 1981, while the defendants' application to appeal pursuant to FRCP 1292 (b) was pending before the Circuit Court of Appeals. (Copies of these papers are appended hereto as Exhibits B, C, D, E and F, respectively.) On January 5, 1982, after oral argument, the

District Court reserved decision pending receipt of further papers relevant to its jurisdiction in light of the pending 1292 (b) application. On January 13, 1982, said papers were hand-delivered to the Court. (A copy thereof is appended hereto as Exhibit G.) No papers in opposition to the application to intervene were filed.

9. No decision issued thereafter from the District Court, and on or about January 27, 1982, this Court granted the 1292 (b) application and consolidated it with the appeal of the District Court's December 1, 1981 decision.

10. The plaintiffs will not be prejudiced by surprise or delay because I will follow the schedule for filing of briefs and preappeal conferences set down by the Court.

11. I have an obvious and direct interest relating to the subject matter

raised in this action because of my direct economic and professional stake in the outcome of this litigation. My interest is underscored because Staten Island, as a unique borough may lose its borough-wide representation on the City Council, and be joined with its more populous neighbor, Kings County. This joinder of counties may well deprive me of my seat on the City Council, and will virtually disenfranchise Staten Island, which is admitted to be the fastest growing borough in New York City.

12. I am advised by counsel that the burden of showing inadequacy of representation is a minimal burden and I need only show that my interests are not identical to those of the parties in this action similarly situated. Clearly, my interests and those of the Borough of Staten Island are disparate from those of Council Members at Large of the other boroughs, in that only Staten Island's

representatives are threatened with a loss of their positions and their constituents alone, among the five boroughs, are threatened with disenfranchisement.

13. The disparity of interests requirement is substantiated by the language of the District Court's decision in this case, where the Court states, at page 14, "Again, the Court discerns no reason why the allocation of at-large seats on a population basis would destroy minor political parties or prevent the election of their candidates in boroughs other than possibly Staten Island." (Emphasis added).

14. The disposition of the issues in this action will certainly impair or impede my ability to protect my right to public office. Obviously, any adverse decision will have broad social, professional and economic ramifications for me, and will have serious ramifications for my constituents. Moreover, my ability

to protect my interest in any subsequent litigation will be substantially impaired by the stare decisis effect of the Court's decision as it stands at present.

15. I also seek intervention under Rule 24(b)(2) in that this application is timely made and, in addition to the other qualifications set forth above, involves a common question of law and fact with the main action in addition to the other qualifications set forth above.

16. I have made no previous application for the relief requested herein.

WHEREFORE, I respectfully request that an order be made joining me as a defendant-intervenor in this action, and permitting me to participate in any further proceedings relating to this action, and for such other and further

relief as may be just.

Dated: Staten Island, New York
February 22, 1982

/s/ ANTHONY I. GIACOBBE
ANTHONY I. GIACOBBE

Sworn to before me this
22nd day of February, 1982.

/s/ LOUISE ROCCO
Notary Public

LOUISE ROCCO
Notary Public State of New York
No. 43-4651388
Qualified in Richmond County
Term Expires March 30, 1983

absolutely correct. However, you were talking -- and I believe you are talking, aside from the Supreme Court in Kirkland v.Preisler, but the result: the majority who control, I am not dealing with that, sir. We are talking about the process. We are talking about the integrity of the process. We are talking about the ability to preserve the voter's right in Brooklyn to have his voice count, as Reynolds v. Sims said it must count and Abate v. Mundt said it must count --

THE COURT: My point is to have his vote count to be effective, and they are effective, because they left a majority of the representatives who indeed control the City Council --

MR. SPERDUTO: I do not dispute -

THE COURT: It is what I would call the principle of atomization. If we were talking about a borough with a minimum population having so many

councilmen that they were able to affect the result, you would have a real good argument.

My problem is, so far as I can see from the briefs, and the statistics, the borough of Richmond here -- I don't know what they can accomplish by the few representatives that they sent to the Council.

I remember one of these Supreme Court cases that said there must be a substantial reason. And that is one of the problems that I have with your position. Because I know, other than what I would call the simon-pure doctrine of equality in voting, where is the real harm, when in fact your constituents, who I am quite certain are members of the majority party, run the council?

MR. SPERDUTO: Again, sir, the harm that we are talking about is one of process. It is not an end result.

I do not believe that it is proper at all for this Court to assess who runs the council --

THE COURT: The Court can't be blinded as to the facts. We don't operate in such a rare atmosphere as to be above the facts.

MR. SPERDUTO: No, sir. You certainly don't.

I am told by my colleagues, and I quote from page four of the Civil Liberties Union brief, fifth line down, that only 44.77 percent of New York City's population reside in districts which could elect a majority of the council. That is the fourth page of the brief, 44.77.

MR. EMERY: Of the reply brief.

Constitution.

MR. SPERDUTO: My answer to that, sir, is yes, it does, because of the one-man one-vote principle.

It is not called the -- affect the majority participation in the New York City Council one-vote rule.

It is not called the Judge Neaher Analysis of Working Coalitions in the New York City Council One-Vote Rule.

This name has meaning. It is the one-person one-vote rule.

You may refer to it as purism, sir, but it is a fundamental right. It is the purity of a fundamental right. And it is preserving that right. It is the right to the voter and not to the City Council men, not to the City Council members.

And it is my position. I am not sure I can say it any differently or any better to you, sir.

THE COURT: Well, all I can say is it does seem to me that there are limits even upon orthodoxy, and that the essential criteria are reason and common sense, and hopefully, even the Supreme Court may accept that as a principle of decision to be interpreted under the Constitution.

I don't think there is much more I can say.

Does anybody else want to say anything before I resign for the night? I have got to get a jury in here, too.

Yes, sir?

Do you want to have the last word?

MR. WOOTEN: Yes, sir, I would like to respond to some of the arguments that were made regarding the race issue, your Honor.

THE COURT: Oh, certainly.

MR. WOOTEN: Yes, your Honor.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL ANDREWS, et al.,

Plaintiffs-Appellees,

-against-

EDWARD I. KOCH, et al.,

Defendants-Appellants

---

82 7007
82 7059

Docket Number

NOTICE OF MOTION

for..retention of mandate.....

.....

82-7007

MOTION BY:

Marjorie Weinberg Rooney - 273-1400

Ronald J. Mazzucco - 273-1400

OPPOSING COUNSEL:

Kim H. Sperduto - 269-1100

Has a request of opposing counsel for consent been refused? N/A

Has service been effected? Yes

Is oral argument desired? No
(Substantive motions only)

Requested return date: Immediate consideration is necessary
(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled:

N/A

MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? N/A (See F.R.A.P. Rule 8.)

Would expedited appeal eliminate need for this motion? No.

If no, explain why not: This is an application for retention of mandate.

Judge or agency whose order is being appealed: Circuit Court of Appeals Affirmation of the Opinion of Judge R. Neaher, (E.D., N.Y.)

Seal of: UNITED STATES COURT OF APPEALS
FILED
APRIL 5, 1982
A.Daniel Fusaro,Clerk
SECOND CIRCUIT

Brief statement of the relief requested:

Retention of Mandate.

Previous requests for similar relief and disposition: None.

Statement of the issue (s) presented by this motion: Whether the mandate which is to issue from the Second Circuit Court of Appeals to the District Court affirming the District Court's judgment holding unconstitutional the ten Council Member at Large seats of the New York City Council should be retained pending appeal to the United States Supreme Court.

Brief statement of the facts (with page references to the moving papers):

By judgment entered March 16, 1982, the Court of Appeals affirmed the District Court's judgment (Neaher, J.) holding unconstitutional the ten Council Member at Large seats of the New York City Council. Council Member Giacobbe intends to appeal the application of the one-person one-vote rule to the United States Supreme Court.

Summary of the argument (with page references to the moving papers):

The motion for retention of mandate should be granted because Council Member Anthony I. Giacobbe will take an appeal to the United States Supreme Court on the grounds that a state statute has been finally adjudicated by the Court of Appeals as unconstitutional because violative of the one-person one-vote rule. The appeal is meritorious (affidavit, pp. 6 - 12). If this Court does not retain its mandate, Council Member Anthony I. Giacobbe will suffer irreparable harm. (affidavit, pp.3 - 5).

April 5, 1982.
Date

/s/ Marjorie Weinberg Rooney
Marjorie Weinberg Rooney

Attorney for
Anthony I. Giacobbe

ORDER

IT IS HEREBY ORDERED that the motion

be and it hereby is denied,

/s/ William H. Timbers byTJM
William H. Timbers

/s/ Thomas J. Meskill
Thomas J. Meskill

Lawrence W. Pierce
Circuit Judge

4/20/82
Date

Seal of: UNITED STATES COURT OF APPEALS
FILED
APRIL 20 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2302

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ANTHONY I. GIACOBBE,

Appellant,

—against—

CARL ANDREWS, PEDRO S. CONDERO and BENJAMIN TERRES,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

TAYLOR E. BRIDGE
LEBOEUF, LAMB, LEIBY & MACRAE
Attorneys for Appellees
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

KIM HOYT SPERDUTO
GWENDOLEN P. JAROV
ELAINE G. LECHNER

Question Presented

Whether the at large councilmanic system mandated by Section 22(b) of the New York City Charter, which allocates an equal number of at large Council seats to each of the City's five boroughs, without regard to vast population disparities among the boroughs, violates the one person one vote rule of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. 81-2302

ANTHONY I. GIACOBBE,

Appellant,

—against—

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION TO AFFIRM

Appellees Carl Andrews, Pedro S. Cordero and Benjamin Tenzer move, pursuant to Supreme Court Rule 16(1)(c),* for an order affirming the unanimous judgment of the Second Circuit Court of Appeals on the ground that the question is so unsubstantial as not to deserve further argument.

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* If, for any reason, this Court considers this motion on grounds other than Rule 16(1)(c) Appellees move, in the alternative, for an order dismissing the appeal pursuant to Rule 16(1)(a), or in the further alternative, submit this brief in opposition to a grant of *certiorari*. Cf. 28 U.S.C. §2103.

Statement of the Case

Plaintiffs' complaint stated eight causes of action.* The first, at issue on this appeal, alleged that §22(b) of the New York City Charter violates the one person one vote rule as embodied in the Equal Protection Clause of the Fourteenth Amendment. On November 17, 1981, the District Court granted plaintiffs' motion for summary judgment on the first cause of action. All defendants** and intervenors appealed.

The Court of Appeals unanimously affirmed the District Court on March 16, 1982, the day after oral argument. The defendant City of New York, and defendants Edward I. Koch, Mayor of the City of New York, Thomas J. Cuite, Majority Leader of the City Council, Melvin Markus, Chairman of the City Council Redistricting Committee, the Board of Elections of the City of New York, and three intervenors below (Boyce, Miller and Stern) have all determined not to appeal. Intervenor-Appellant Anthony I. Giacobbe, at large Council member from Staten Island, stands alone in insisting on Supreme Court review.

The Court of Appeals affirmed the District Court on the basis of the lower court's opinion. The District Court found that, even utilizing the most conservative method of computation, the total percentage deviation from population equality for the New York City Council was 50.4%. (App.

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* This Court has once before addressed this action. On September 8, 1981, plaintiffs (Appellees here) obtained an order, based on §5 of the Voting Rights Act, 42 U.S.C. §1973(c), enjoining the elections in New York City scheduled for September 10. On September 9, defendants sought review in the United States Supreme Court, which unanimously refused to stay the injunction. No. A-218.

** Except City Council President Carol Bellamy, who determined not to appeal even the District Court opinion.

16).* Neither this Court nor any other court has ever countenanced a percentage deviation even approaching the magnitude of that involved here. Because no state justification —much less those proffered by the appellant—could justify the vast discrepancies at issue here, the motion to affirm should be granted.

ARGUMENT

POINT I

Section 22 of the New York City Charter Violates the *Reynolds* Rule of One Person One Vote.

Legislative districts, including local legislative districts,** must be apportioned on a population basis; failure to do so constitutes a violation of the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). "The conception of political equality . . . can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963). The determination of whether an apportionment scheme meets the *Reynolds* rule of population equality "requires a quantitative analysis." *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1158 (5th Cir. 1981).

As the focus of analysis shifts from Congressional districts to local legislative districts, courts have tolerated slightly greater deviations from population equality. "Mathematical exactness is not required." *Reynolds, supra*, at 569. Yet even with this flexible approach, "a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted

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* All references to "App. ——" refer to the given page of the Appendix filed with the Appellant's Jurisdictional Statement.

** *Avery* v. *Midland County*, 390 U.S. 474 (1968).

to emasculate the goal of substantial equality." *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973). The populations of the at large districts under scrutiny here are not substantially equal. No sleight of hand can render the population of Brooklyn—2,230,936—and the population of Staten Island —352,131—substantially equal.

While this Court has never drawn a bright line standard beyond which no apportionment scheme may legally venture, the parameters of acceptability have been delineated by the case law. Thus, the highest percentage deviation* from population equality in a state legislative scheme ever upheld by the Supreme Court was 16.4% in *Mahan* v. *Howell, supra*, where Justice Rehnquist suggested that such a figure "may well approach tolerable limits." 410 U.S. at 329. *See, e.g., Gaffney* v. *Cummings*, 412 U.S. 735 (1973) (7.83% total percentage deviation approved); *White* v. *Regester*, 412 U.S. 755 (1973) (9.9% deviation approved); *Connor* v. *Finch*, 431 U.S. 407 (1977) (16.5% and 19.3% disapproved); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) (24.78% and 28.2% disapproved); *Swann* v. *Adams*, 385 U.S. 440 (1967) (25.65% disapproved); *see also Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D.Va. 1981).

As recognized by both courts below, the case most directly relevant is *Abate* v. *Mundt*, 403 U.S. 182 (1971), where this

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* In *Abate* v. *Mundt*, 403 U.S. 182 (1971), the formula for determining percentage deviations was described as follows:

> For purposes of comparison as to representation between the districts a determination of the ideal representation can be computed by dividing the total population by the number of legislators, resulting in an ideal representation per legislator. . . . This figure of ideal representation can then be compared with the actual representation for each legislator to determine the extent of over and under representation.

Petitioner's Brief to the Supreme Court in *Abate* v. *Mundt*, at 4-5, accepted by the Court *sub silentio*.

Court approved an 11.9% percentage deviation for the county legislature of Rockland County, New York. That decision properly assessed the flexibility to be granted local governments:

> In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, *Sailors* v. *Board of Education*, 387 U.S. 105, 110-111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds* v. *Sims*, *supra* at 578. These observations . . . lend support to the argument that *slightly greater percentage deviations may be tolerable* for local government apportionment schemes, cf. *ibid.* Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community may sometimes justify departures from *strict equality*. Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors. . . .

403 U.S. at 185-86 (emphasis added).

Yet, the New York City Council scheme mandated by the City Charter grants disproportionate representation to certain geographic areas; solely on the basis of residence, the voters of Staten Island have a disproportionately strong voice, at the expense of voters of the more populous bor-

oughs. The 50.4% percentage deviation at issue here is more than four times that "guardedly sanctioned in *Abate*" (App. 19) and is more than three times that found to "approach tolerable limits" in *Mahan*. The disproportionate representation mandated by Section 22 of the New York City Charter so far exceeds constitutional limits that the question appealed is unsubstantial and does not merit further argument.

POINT II

Appellant's Proffered Justifications Impermissibly Emasculate the *Reynolds* Rule.

Each of the alleged justifications urged by the Intervenor-Appellant was considered, and rejected, by both the District Court and Court of Appeals. None of the proffered rationales justifies a deviation from population equality that is facially unconstitutional.

In *Cosner* v. *Dalton*, 522 F. Supp. 350 (E.D.Va. 1981) (three-judge court) the reapportionment plan for the Virginia House of Delegates had, depending on the method of calculation, maximum percentage deviations ranging from 22.13% to 25.72%. *Id.* at 355-56. The Virginia defendants, like defendants here, attempted to justify their plan by urging the compelling nature of local policies, including retention of existing districts, incumbency concerns, natural communities of interest, and preservation of local subdivisions.

The *Cosner* court held, in part, that the Virginia plan was *facially* unconstitutional:

> At one time or another, the Supreme Court has expressly or tacitly recognized that most of the policies

> considered by Virginia permit deviation from strict numerical equality. The Court has never held, however, that these state interests, though legitimate, may be aggregated to justify population variances as large as those disclosed by the Virginia Act. . . . Guided by the precepts that the Supreme Court has explained in the cases we have cited, we conclude that the [Virginia reapportionment] is *facially unconstitutional* because the deviation among the populations of the districts exceeds the limits tolerated by the Equal Protection Clause.

Id. at 357-58 (emphasis added). If 25.72% deviation from population equality is facially unconstitutional, *a fortiori*, 50.4% deviation is unconstitutional.

This Court has already rejected other justifications urged by the appellant. Appellant's attempt to legitimate §22 of the Charter by reference to the public referendum which endorsed the at large system is misplaced. "The fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause. . . ." * *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 737 (1964).

Appellant's analysis of how political outcomes and legislative coalitions would (or would not) be modified by invalidation of the at large regime is similarly meritless. Whether Staten Island councilmembers can impose their political will on others is an irrelevant consideration. "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional mus-

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* See also the cases cited in POINT I, *supra*, and the accompanying percentage deviation data.

ter." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 533 (1969). The *Kirkpatrick* Court squarely rejected the notion that "considerations of practical politics can justify population disparities." *Id.* at 534.

Finally, appellant's continued reliance on *Blaikie* v. *Wagner*, 258 F. Supp. 364 (S.D.N.Y. 1965) (three-judge court) demonstrates how far appellant must strain to justify his appeal. In 1965, the *Blaikie* court did not have the benefit of modern Supreme Court learning, "which has been considerably refined since . . ." *Whitcomb* v. *Chavis*, 403 U.S. 124, 163 (1971). One of the primary refinements has been meticulous attention to quantitative data demonstrating the total "percentage deviation" from population equality. It is now clear that a quantitative analysis is required. *Wyche*, *supra*, at 1159. Yet *Blaikie* is entirely silent as to the pertinent percentage deviations involved. Moreover, the *Blaikie* court accorded great weight to considerations which are improper under a modern *Reynolds* analysis. The machinations of hypothetical coalitions are, under contemporary legal teaching, irrelevant. Attempting to count votes, or to assess legislative majorities, is neither the proper role for a court nor a proper analysis under the one person one vote rule. *Kirkpatrick*, *supra*.

Both the District Court and the Court of Appeals rejected the *Blaikie* analysis. One measure of that case's lack of persuasive force is that in the sixteen years since it was decided, *Blaikie* has been cited by other courts only three times, and not once within the last decade. By omitting any reference to *Blaikie* during that decade, courts have clearly assessed that case's proper place in the annals of reapportionment law. Appellant cannot seriously contend that the *Blaikie* case could be decided and upheld today on the basis of the opinion which it inspired in 1965.

The *Reynolds* Court offers the dispositive response to today's lonely appellant:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

Appellees respectfully submit that this Court can answer no differently.

CONCLUSION

The percentage deviation here—50.4%—is more than three times greater than that ever sanctioned by the Supreme Court, even according the locality flexibility to account for "the particular circumstances and needs of [the] local community." The percentage deviation here is more than twice that held to be *facially* unconstitutional. Appellant has failed to present a substantial question for review in this Court. The motion to affirm should be granted.

Dated: New York, New York
July 8, 1982

Respectfully submitted,

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No. 81-2302

IN THE

Supreme Court of the United States

October Term 1982

ANTHONY I. GIACOBBE,

Appellant,

- against -

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Appellant Anthony I. Giacobbe submits this brief in opposition to appellees' motion pursuant to Supreme Court Rule 16 (1)(c) for an order summarily affirming the judgment appealed and in further support of appellant's application that this Court note probable jurisdiction and schedule this appeal for plenary briefing

and argument.

A full statement of the case and the question presented for review are contained in the initial Jurisdictional Statement, to which the Court is respectfully referred.

ARGUMENT

This appeal presents the question of whether the "one person, one vote" principle must, as respondents would have it, be applied in a wooden fashion, shackled to a simplistic "quantitative analysis", or whether, to use the words of the District Court during oral argument, "there are limits even upon orthodoxy, and that the essential criteria are reason and common sense." (A. 90)

The difference between these two approaches is exemplified by the two lower court opinions that have considered the constitutionality of New York City's at large councilmanic seats, reaching oppo-

site results. In the first case, Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965), the three-judge District Court undertook a meticulous and searching analysis of the unique challenges and requirements of New York City's unicameral legislative body, which was comprised then, as it is now, of at large and district seats. The Blaikie court unanimously concluded that the "minimal" voting disparity introduced by Staten Island's "extra" at large seat was constitutionally justified by the goal of affording "at least the possibility of representation" to the City's minority party voters. 258 F. Supp. at 369, 370.

In the case at bar, however, the District Court, despite its misgivings (see p. 2, supra), felt itself "constrained" to eschew any analysis whatsoever of the merits of the at large system, and struck it down on a purely mathematical

basis.*

Respondents argue in their Motion to Affirm that the reasoned analysis of the Blaikie court has been rendered obsolete by subsequent "refinements" in this Court's "one person, one vote" decisions since Reynolds v. Sims, 377 U.S. 533 (1964), and that the District Court's approach in this case was mandated by "modern Supreme Court learning." Indeed, as respondents read this Court's opinions, the services of a federal judge were hardly required to invalidate New York City's delicately balanced legislative system -- the job could have been done by a clerk with a pocket calculator.

Initially, it must be noted that the appellees point out that the percentage deviation from population equality as determined by the District Court was the result of the application of Abate v.

*The Second Circuit affirmed on the opinion below the day after oral argument, and thus offered no new analysis of its own.

Mundt, 403 U.S. 182 (1971). Appellant contends, under the facts of this case, that it was error for the District Court to apply the formula in Abate for determining percentage deviation.

The Abate formula involves the division of the total population of an area by the number of legislators, resulting in a numerically ideal representation per legislator. The resulting figure is then compared with the actual representation for each legislator to determine the extent of over and under representation.

The facts in Abate are inapposite to the facts of the instant case. In Abate, the legislative body was composed solely of district representatives and each legislator represented a separate, distinct, and different constituency. In the instant case, the New York City Council is composed of district and at large representatives and the Council Members at Large represent the same constituents as do the

District Council Members.

Council Member Giacobbe, for example, representing the entire Borough of Staten Island, represents the same people represented by the 1.8 District Council Members for Staten Island. Each of the Council Members at Large from Brooklyn represents the same constituents as do the total number of District Council Members representing the Borough of Brooklyn. The same is true with respect to the constituents of the at large members from the remaining three boroughs. It is clear that the application of Abate presupposes that each legislator represents a separate and different constituency. Because that is not the case with respect to each member of the New York City Council, it was error for the District Court to apply Abate to arrive at what is obviously an exaggerated and misleading figure of percentage deviation.

Moreover, appellant does not believe

that this Court has so utterly abandoned the use of "reason and common sense" in its approach to difficult apportionment problems. This Court's decisions in such cases as Dusch v. Davis, 387 U.S. 112 (1967) and Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967) emphasize the need for innovation and flexibility in resolving the complex problems of urban government. Moreover, in Hechinger v. Martin, 411 F. Supp. 650 (DDC 1976), this Court recognized that the goal of facilitating some representation of political minorities in city government -- the same goal served so successfully by New York City's at large system -- may justify a minimal infringement of another protected constitutional right.*

The fact that the Democratic Mayor of

*In Hechinger, the right interfered with by Washington D.C.'s at large system was the First Amendment right to free political association -- certainly a right every bit as worthy of protection as the equal protection right claimed by respondents here.

New York City and the Democratically-controlled City Council have given up the fight for the preservation of the at large seats is hardly surprising. Nor is it conclusive of the merits of this appeal. The very purpose of the at large system is to challenge the Democratic Party's monopoly grip on the reins of political power in New York City. The right which Mr. Giacobbe seeks to vindicate here does not belong to the government but to the voters -- specifically the minority party voters who elected him to office and who have been disenfranchised by the abolition of the at large seats.

New York City government is not a problem which can be solved on a computer. The at large system, a feature of New York City government for eighteen years, was the product of the practical and innovative thinking of two distinguished commissions, and received the overwhelming

endorsement of the voters at a public referendum. Appellant respectfully submits that the same considerations which led the Blaikie court to uphold the constitutionality of the at large seats in 1965 remain valid and compelling today, and that the subsequent decisions of this Court do not close the door to such a realistic appraisal of the legitimate requirements of fair government in New York City.

If, on the other hand, respondents are correct in their interpretation of this Court's post-Blaikie decisions, then this appeal, which concerns the government of the nation's largest City, presents an appropriate occasion for a critical reassessment of this vital area of constitutional doctrine.

In either case, this appeal presents a substantial federal question entitled to plenary consideration by this Court.

Conclusion

For the reasons stated above, respondents' motion should be denied.

Respectfully submitted,

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